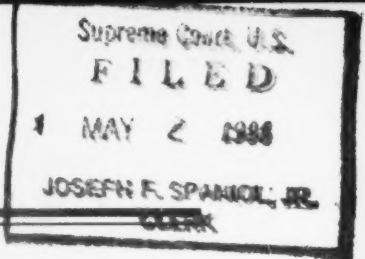


87 1796

No. _____



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,
Petitioners,

v.

L. J., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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**Counsel of Record*

May 2, 1988

QUESTION PRESENTED

Are social workers deprived of the defense of qualified immunity and subject to private actions for damages under 42 U.S.C. §1983, because the foster care funding provision of the Social Security Act enacted in 1961 "clearly established" legal duties enforceable by suits against them for alleged breaches of that Act?

LIST OF PARTIES

The parties to this proceeding below were as follows:

1. The plaintiffs (now respondents) were individual foster children (anonymously referred to as L.J., O.S., M.S., C.S., P.G., R.K. and S.J.) and a class of foster children; and

2. The defendants (now petitioners) were a state agency, Baltimore City Department of Social Services (BCDSS), and twenty individual state officials.*

* The individual defendants include Ruth Massinga, Maryland's cabinet level Secretary of Human Resources; Frank Farrow, then the State Director of the Social Services Administration (SSA); Joy Duva, then Director of SSA Office of Child Welfare Services; Bud Nocar, then SSA Program Manager of Foster Care Services; Alma Randall, then SSA Program Manager for 24-Hour Group Care and Licensing; George Musgrove, Director of BCDSS; Michael Warner-Burke, then Chief of Protective Services of BCDSS; and BCDSS caseworkers and supervisors, including Anthony Baird, Allen Collins, Delores Cooper, Elvia Dewatkins, Gail Fulton, Cheryl Gibson, Emma Graves, Marylyn Holcombe, Susan Lieman, Jerilyn Simmons, Bridgette Thomas, Dawn Zinkand and Susan Zuravin.

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No. _____

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RUTH MASSINGA, et al.,

Petitioners,

v.

L.J., et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled proceeding.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland have decided the issue raised by this petition. The opinion of the Court of Appeals is reported at 838 F.2d 118, and is reprinted in the separate appendix to this petition ("App.") at 1a-24a. The memorandum decision and order of the district court has not been reported. It is reprinted at App. 25a-72a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 1, 1988. This petition was filed within 90 days of that judgment.^{1/} This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

^{1/} The 90th day was Sunday, May 1, 1988; therefore, this petition was timely filed on Monday, May 2, 1988. See Sup. Ct. R. 29.1.

STATUTES INVOLVED

The statutes involved are:

42 U.S.C. §608 (repealed in 1980),
reprinted at App. 73a-78a;

42 U.S.C. §627, reprinted at App. 79a-
81a;

42 U.S.C. §671, reprinted at App. 82a-
89a; and

42 U.S.C. §675 (1) and (5), reprinted at
App. 90a-93a.

STATEMENT OF THE CASE

On December 5, 1984, respondents (plaintiffs below) filed this civil rights action under 42 U.S.C. §1983 in the United States District Court for the District of Maryland. They sought class declaratory and injunctive relief against twenty individual state defendants, including administrators, supervisors and caseworkers of the foster care program administered by Baltimore City Department of

Social Services, a local unit of Maryland's Department of Human Resources. The complaint alleged injuries resulting from violations of duties arising under the Constitution of the United States, the Social Security Act, and Maryland common law.

On January 30, 1985, defendants filed, in response to the money damages claims, a motion for partial summary judgment based on the qualified immunity doctrine. On July 27, 1987, the district court issued an unpublished memorandum and order denying defendants' motion. (App. at 25a-72a).^{2/}

The State appealed the immunity decision, arguing that no affirmative duty of protection redressable by a damage action has yet been recognized, much less was it clearly established since the 1960's as alleged in

^{2/} Also on July 27, 1987, the district court issued a preliminary injunction against the State in an unpublished memorandum and order.

plaintiffs' complaint.^{3/} The Fourth Circuit, affirming the judgment of the district court, held that "defendants' statutory duty was clear and certain and therefore they are not entitled to invoke the immunity defense." (App. at 17a-18a).^{4/}

REASONS FOR GRANTING THE WRIT

SUMMARY

This case presents the important question of whether in a \$1983 suit for damages alleging violations of the foster care funding provisions of the Social Security Act state social workers have the qualified immunity defense.

^{3/} The State also appealed the grant of plaintiffs' motion for a preliminary injunction. See n.2, supra.

^{4/} The Fourth Circuit did not reach the question of whether defendants had a constitutional duty to protect plaintiffs. (App. at 18a). The Court of Appeals also affirmed the entry of the preliminary injunction against the State. (App. at 15a).

This Court never has held that a state's violation of the Social Security Act creates a cause of action for damages against individual state employees, and neither the Fourth Circuit nor any other circuit previously had so held. Nevertheless, in this case, the Fourth Circuit held that Congress's enactment in 1961 of the foster care provision of the Social Security Act clearly established rights and duties that plaintiffs may enforce against state social workers in their individual capacities and for money damages.

The Fourth Circuit simply was wrong to hold that a right of action for damages under §1983 was clearly established by the enactment of the foster care provisions of the Social Security Act. Such a right was not clearly established at the time of the acts or omissions of which the plaintiffs complained. At the earliest, this right did not

exist until the courts below created it (assuming, arguendo, that their holdings were correct).

This unprecedented decision broadens the foster care provisions of the Social Security Act to horizons not previously envisioned by the Congress, the Judiciary or the Executive Branch; is a wholesale expansion of civil rights law; opens the federal courts to damage suits by children against social workers for decisions made decades ago; and raises serious questions regarding the substantial risks to which Congress and the states unwittingly may be exposing state officials in numerous statutory schemes enacted in the spirit of cooperative federalism. Before social workers in Maryland and all other states receiving federal foster care funds are denied the defense of qualified immunity, this Court should review this case.

THIS CASE PRESENTS THE IMPORTANT AND UNRESOLVED QUESTION OF WHETHER STATE SOCIAL WORKERS AND SUPERVISORS ARE ENTITLED TO QUALIFIED IMMUNITY IN DAMAGE ACTIONS UNDER THE CIVIL RIGHTS ACT FOR ALLEGED VIOLATIONS OF THE FEDERAL FOSTER CARE STATUTES.

I. Under Harlow And Its Progeny, Defendant Social Workers And Their Supervisors Are Immune From \$1983 Suits For Damages Unless They Violated "Clearly Established" Law.

The Fourth Circuit's decision cannot be reconciled with Harlow v. Fitzgerald, 457 U.S. 800 (1982), and its progeny. Harlow established an objective test for qualified immunity:

. . . [G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. Officials are immune "unless the law clearly proscribed the actions" they took. Mitchell v. Forsyth, 472 U.S. 511, 528

(1985).^{5/}

Here, plaintiffs demanded money damages against social workers for injuries allegedly sustained in foster homes as early as 1969. Plaintiffs charged that their rights were violated by those social workers who placed them in or failed to remove them from foster homes that were "unsuitable". See, e.g., District Court opinion (App. 26a). The Fourth Circuit held that the social workers were not entitled to qualified immunity in this case, because they allegedly violated plaintiffs' clearly established statutory right to "care and protection", and that this right is enforceable under 42 U.S.C. §1983. 838 F.2d at 122 (App. at 17a).

^{5/} The unlawfulness of the official's conduct must be "apparent"; the right the official is charged with violating "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3039 (1987).

The Fourth Circuit derived this "clearly established" statutory right to "care and protection" from a federal funding statute -- the foster care provisions of the Social Security Act -- and found that since 1961, when Congress enacted the first such provision, defendants' statutory duty was "clear and certain" by virtue of this enactment alone. Id.^{6/}

This holding has a truly staggering impact on all state officials who administer federal grant programs.^{7/} The Fourth

^{6/} The Fourth Circuit bolstered its holding by surveying the subsequently enacted Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §670 et seq. ("Adoption Assistance Act"), specifically 42 U.S.C. §§627, 671 and 675(1) and (5). The court then concluded that "[t]aken together...these statutory provisions spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied." Id. at 123 (App. at 22a).

^{7/} The social workers here are alleged to have violated foster children's rights as early as 1969. Plaintiff P.G. is alleged to have been placed in a home where the parents were "unfit to serve as foster parents" in 1969, when she was a toddler. See District Court opinion (App. at 29a). Unless overturned, the Fourth Circuit's holding that foster

Circuit's decision requires social workers (and by analogy all state officials administering any federal grant program) to stand trial for damages for a violation of a federal funding statute. Rather than being "clearly established", that principle is unprecedented. No reasonable--social worker could have known -- or should have known -- that because the State received federal foster care funds, he or she could be made to defend such allegations on their merits and could be held personally liable for violations of the grant conditions. Conversely, and yet equally importantly, no State could have known that acceptance of these funds would strip its officials of their immunity.

children's rights were clearly established in 1961 will expose social workers to second guessing of thousands of difficult decisions made over decades of serving children. See Md. Cts. and Jud. Proc. Code Ann. §5-201 (1987 Cum. Supp.) (The statute of limitations in Maryland is tolled until three years after a child reaches 18, unless the child has a disability thereby tolling the statute until three years after the disability is eliminated.).

Until the Fourth Circuit's decision in this case, no circuit court had ever ruled that the foster care provisions of the Social Security Act clearly established a right to care and protection enforceable through damage actions. At best, therefore, the law on this issue is "clearly established" only now.-

II. A Right to Care and Protection Was Not Clearly Established by Congress's Enactment of the Foster Care Provisions of the Social Security Act.

A. There Is Substantial Doubt That Violations Of Spending Clause Statutes Create a Cause of Action for Damages Under 42 U.S.C. §1983.

This Court has suggested strongly that damages are unavailable in §1983 claims asserting deprivation of rights secured under federal grant statutes. The Fourth Circuit nevertheless discovered a right to damages under §1983 from statutes which, it concedes, "are largely statutes relating to appropriations. . . ." 838 F.2d at 123 (App. at

22a).^{8/} The court simply ignored the special treatment this Court has given Spending Clause cases and completely overlooked settled doctrine as to when rights enforceable under §1983 may be asserted.^{9/}

^{8/} The Fourth Circuit's reliance on Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S.Ct. 766 (1987), was misplaced. Wright did not involve money damages. In Wright plaintiffs claimed that a public housing authority overbilled them for utilities in violation of the rent ceiling imposed by the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. §1437a. Plaintiffs sought an injunction and recovery of alleged past improper charges. 107 S.Ct. at 770 n. 5. These remedies are equitable, not legal. Cf. Curtis v. Loether, 415 U.S. 189, 197 (1974) (order to disgorge wrongfully withheld funds equitable in nature).

^{9/} Although Maine v. Thiboutot, 448 U.S. 1 (1980), held that §1983 was available to enforce violations of federal statutes by state officials, Pennhurst State Hospital and School v. Halderman, 451 U.S. 1 (1981) and Middlesex County Sewage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19 (1981), recognized two exceptions to the application of §1983 to remedy statutory violations: when Congress has foreclosed enforcement of the statute in the enactment itself; and where the statute did not create enforceable rights, privileges or immunities within the meaning of §1983. To determine whether Congress meant to create legally enforceable rights under its spending power through grant-in-aid programs, Pennhurst further required an explicit expression of intent:

...[I]f Congress intends to impose a condition on

In Pennhurst State Hospital and School v. Halderman, 451 U.S. 1, 29 (1981), this Court observed that it has never required a State "to provide money to plaintiffs" to remedy violations of a statute enacted under the Spending Clause. Id. at 29. For this reason, Justice White, with the concurrence of Chief Justice Rehnquist, noted in Guardians Assn. v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983),

the grant of federal monies, it must do so unambiguously.... By insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17. See also Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987) (Wald, C.J.) ("The task for each court in determining whether a provision in a grant-in-aid program secures rights is to ask whether Congress has spoken with a 'clear voice' so that states and local governmental units may 'exercise their choice knowingly.'"). No such explicit expression of an intent to create enforceable rights within the meaning of §1983 is found in the foster care provisions of the Social Security Act.

that "make whole remedies", including damages, are ordinarily not appropriate in private actions alleging violations of the terms of federal grants. Id. at 596. "Damages indeed are usually available in a §1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute." Id. at 602 n. 23. Cf. Pennhurst, supra, 451 U.S. at 29 (interpreting Rosado v. Wyman, 397 U.S. 397, 420 (1970), to limit power of courts to require states to spend funds to comply with federal funding statute).

B. Congress Did Not Create Specific and Definite Rights Enforceable By Foster Children In §1983 Damage Actions.

Nothing in the language or the legislative history of the foster care statutes remotely supports the Fourth Circuit's dis-

covery of a cause of action for damages.^{10/}

It is unlikely that Congress intended to create any enforceable rights at all when it enacted the foster care funding statutes, much less rights enforceable through \$1983 damage suits.^{11/} Nowhere in these statutes did Congress confer on foster children rights sufficiently specific and definite to qualify

^{10/} Although the legislative history of the 1961 provision, 42 U.S.C. §608(f), is silent on this point, the history of the 1980 legislation (the Adoption Assistance Act) demonstrates that the prior law was not clearly established. Senator Cranston discussed the uncertainty under 42 U.S.C. §608(f): "The legislation as reported would strengthen the provisions in existing law by describing exactly what factors should be covered in the case plan. The bill provides under the proposed section 472(a)(5) that each child in foster care shall have a case plan. * * *

It is our hope that these specific requirements will assist in providing the kind of focus for case plans that is missing under current law." 125 Cong. Rec. S15290-91 (daily ed. Oct. 29, 1979) (remarks of Sen. Alan Cranston) (emphasis added).

^{11/} See Edwards, supra, 821 F.2d at 656: "The courts of appeals in the aftermath of Pennhurst have, for the most part, upheld rights claims in statutes that dictate little room for choice, while rejecting rights claims in statutes that merely indicate broad preferences."

as enforceable rights under §1983. See Wright, supra, 107 S.Ct. at 775.^{12/} Where, as here, Congress gave state officials discretion on how to meet broad policy objectives, it did not create rights enforceable through §1983.^{13/}

The funding statutes relied on by the courts below, even taken together, fail to clearly establish specific rights actionable in damages under §1983. Absent such notice

^{12/} The statutory language conditions receipt of federal funds on a state's compliance with specified requirements. 42 U.S.C. §627(a) (" . . . a State shall not be eligible for payment from its allotment . . . unless"); 42 U.S.C. §671(a) ("In order for a state to be eligible for payments under this part, it shall have a plan").

^{13/} For example, to prevent foster care placement, Congress provided funds for eliminating the causes of removal, see 42 U.S.C. §627(b)(3), while recognizing the need for case-by-case decisions. "The Committee recognizes that the decision as to the appropriateness of (preventive services in) specific situations will have to be made by the administering agencies having immediate responsibility for the care of the child." H.R. Rep. No. 96-136, 96 Cong. 1st Sess. 47 (1979). Services to help children return to their families are to be provided "where appropriate". 42 U.S.C. §627(a)(2)(C).

that their actions were unlawful, social workers may not be deprived of their immunity. Anderson, supra, 107 S.Ct. at 3039.^{14/}

C. Decisional Law Fails To Clearly Establish That Violations Of The Social Security Act Create A Cause Of Action For Damages Under 42 U.S.C. §1983

The Fourth Circuit is the only circuit to hold that a §1983 cause of action for damages is available for alleged violations

^{14/} "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, supra, 107 S.Ct. at 3039. If not precisely identified, the rule of qualified immunity could be converted by plaintiffs into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Id.

of the federal foster care statutes.^{15/}
Until the lower courts divined such a right
in this case, only a right to seek pro-
spective equitable relief to enforce provi-
sions of the Social Security Act had been
"clearly established." See, e.g. Rosado,
supra; Miller v. Youakim, 440 U.S. 125
(1979); King v. Smith, 392 U.S. 309
(1968).^{16/}

^{15/} Two other circuits (the Sixth and the Eighth)
have found that failure to comply with provisions of
the Adoption Assistance Act of 1980 does not give rise
to a §1983 claim for damages. See Lester v. Lavrich,
784 F.2d 193, 197-98 (6th Cir. 1986) (alleged viola-
tion of preplacement preventive service requirement
did not constitute claim for damages under §1983);
Scrivener v. Andrews, 816 F.2d 261 (6th Cir. 1987)
(citing Lester, damages unavailable in §1983 action
alleging violation of Adoption Assistance Act);
Harpole v. Arkansas Dept. of Human Services, 820 F.2d
923, 928 (8th Cir. 1987) (funding statutes enacted "to
enable states to provide financial assistance to needy
persons and not as a means of seeking compensation
when one of those persons is indirectly injured by the
State").

^{16/} But see Wilder v. City of New York, 568 F.Supp.
1132 (E.D.N.Y. 1983) (authorized damages under §1983
for violations of the foster care statute). Two other
district courts, however, found no cause of action for
damages for violations of the Social Security Act.

Congress did not intend to create any rights enforceable through §1983 damage suits. And certainly the absence of decisional law recognizing such a cause of action proves that such rights are not "clearly established".

CONCLUSION

The question of whether social workers are immune from damage actions such as this one is an important national public policy question that demands resolution by this Court. The proper administration of the foster care program requires that social workers exercise their professional judgment in the difficult and delicate area of child

in Re Scott County Master Docket, 672 F.Supp. 1152, 1203-05 (D. Minn. 1987) (challenge to home removal resulting from suspected child sexual abuse in alleged violation of Adoption Assistance Act not actionable in damage suit under §1983). Jensen v. Conrad, 570 F. Supp. 91, 111-13 (D.S.C. 1983), aff'd on other grounds, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (no cause of action for damages under §1983 for violations of Title IV-B of Social Security Act or Child Abuse Prevention and Treatment Act of 1974).

welfare.^{17/} As a matter of law and sound public policy, social workers and all other state and local officials who administer programs financed in part by federal funds must, at the very least, be given considerably clearer notice of the individual risk they undertake on behalf of the common good.

^{17/} Anderson, supra, 107 S.Ct. at 3038 ("[D]amage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); Davis v. Scherer, 468 U.S. 183, 196 (1984) ("Nor is it always fair, or sound policy, to demand official compliance with statute or regulation on pain of monetary damages. Such officials . . . routinely make close decisions in the exercise of the broad authority necessarily delegated to them . . . [and] should not err always on the side of caution."); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974), ("Implicit in the idea that officials have some immunity . . . is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error than not to decide or act at all.")

This Court should grant the petition and review the judgment of the Fourth Circuit. Following review, that judgment should be reversed.

Respectfully submitted,

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87 No. 1796

Supreme Court, U.S.

FILED

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JOSEPH E. SPANIOLO, JR.

CLERK

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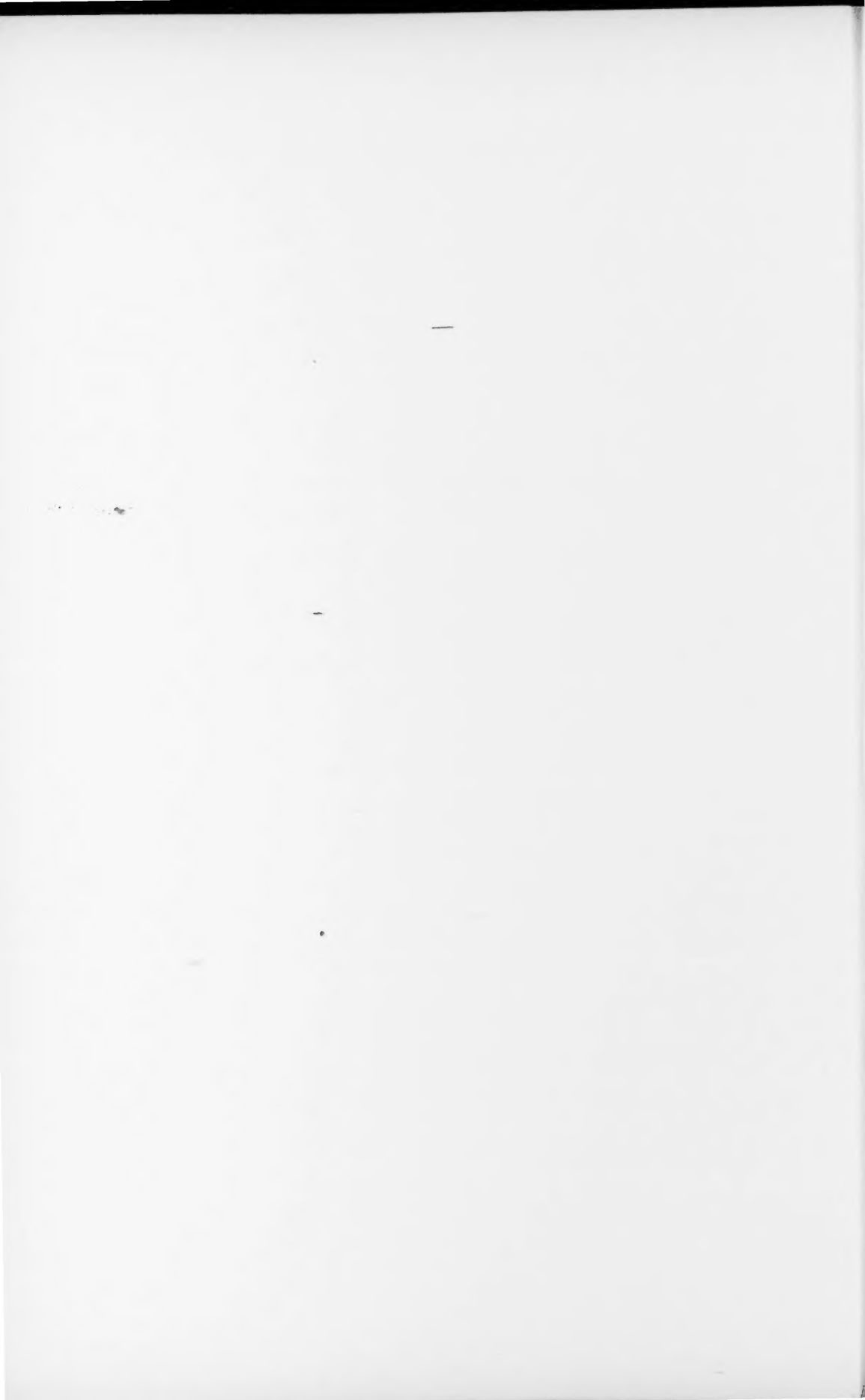
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2156

L.J. An Infant, By and Through His Next Friend, Lydia Kaye Darr and; O.S., An Infant, By and Through Her Next Friend, Jackie Garner and; M. S., An Infant, By and Through her Next Friend, Susan Leviton and; C. S., An Infant, By and Through Her Next Friend, Susan Leviton and; P.G., An Infant, By and Through Her Next Friend, Margaret Evans on Their Behalf and On Behalf of All Others Similarly Situated; R.K.; S.J.

Plaintiffs - Appellees

versus

RUTH W. MASSINGA, Individually and as Secretary of the Maryland Department of Human Resources; and; FRANK FARROW, Individually and as Executive Director of the Maryland Social Services Administration; and; JOY DUVA, Individually and as Director of the Office of Child Welfare Services, Maryland Social Services Administration; and; BUD NOCAR, Individually and as Acting Program Manager Foster Care Services of the Maryland Social Services Administration; and; ALMA RANDALL, Individually and as Program Manager for 24-Hour Group Care and Licensing of the Maryland Social Services Administration and; BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES, and; GEORGE MUSGROVE, Individually and as Director of the Baltimore City Department of Social Services; and; MICHAEL WARNER-BURKE, Individually and as Chief of Protective

Services for the Baltimore City Department of Social Services for the Baltimore City Department of Social Services; and; CHERYL GIBSON, Individually and as Caseworker for the Baltimore City Department of Social Services; and; BRIDGETTE THOMAS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; MARYLYN HOLCOMBE, Individually and as Caseworker for the Baltimore City Department of Social Services; and; DELORES COOPER, Individually and as Caseworker Supervisor of the Baltimore City Department of Social Services; and; GAIL FULTON, Individually and a Caseworker for the Baltimore City Department of Social Services; and; ELVIA DEWATKINS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; DAWN ZINKAND Individually and as Caseworker of the Baltimore City Department of Social Services; and; JERILYN SIMMONS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; ANTHONY BAIRD, Individually and as Caseworker for the Baltimore City Department of Social Services; and SUSAN LIEMAN, Individually and as Caseworker Supervisor for the Baltimore City Department of Social Services; and; ALLEN COLLINS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; SUSAN ZURAVIN, Individually and as Caseworker for the Baltimore City Department of Social Services; and; EMMA GRAVES, Individually and as Caseworker for the Baltimore City Department of Social Services; and; JOHN ROES 1 THROUGH 12, Individually and as Caseworkers for the Baltimore City Department of Social Services

Defendants - Appellants

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Joseph C. Howard, District Judge. (CA84-4409)

Argued: December 4, 1987
Decided: February 1, 1988

Before WINTER, Chief Judge, and RUSSELL and
MURNAGHAN, Circuit Judges.

Judson Paul Garrett, Jr., Deputy Attorney
General (J. Joseph Curran, Jr., Attorney
General of Maryland, Ralph S. Tyler, Assis-
tant Attorney General on brief) for Appel-
lants; William Lee Grimm (Ethel Zelenske;
Legal Aid Bureau, Inc. on brief); Ward
Baldwin Coe, III (Nevett Steele, Jr.,
Whiteford, Taylor & Preston; Carol R.
Golubock, Children's Defense Fund on brief)
for Appellees.

WINTER, Chief Judge:

Plaintiffs, present or former foster children in the custody of the Baltimore City Department of Social Services, sued twenty-one state and city officials, caseworkers and supervisors who played a role in administering Maryland's federally-funded foster care program in Baltimore City. They alleged that, as a result of defendants' maladministration of the program, they were victims of physical and sexual abuse as well as medical neglect. They sought broad interim and permanent injunctive relief to redress the deficiencies in the administration of the program and money damages.

Defendants traversed the claims for injunctive and monetary relief and also specially pled their good faith immunity to damages for plaintiffs' claims prior to 1980 and our holding in Jensen v. Conrad, 747 F.2d 185 (4 Cir. 1984), cert. denied, 470 U. S.

1052 (1985).

The district court heard and decided defendants' claim for qualified immunity and plaintiffs' claim for interim injunctive relief. It granted a preliminary injunction requiring defendants to submit a plan for review of foster homes about which a report of maltreatment has been made, to monitor child placements in foster homes at least monthly and in some instances weekly, to expand its medical services to foster children including the keeping of medical records, and to provide prompt written reports of maltreatment of foster children to their attorneys and the juvenile court including the action taken thereon. It denied defendants' claim of immunity, and it imposed attorneys' fees and expenses as sanctions on defendants, in an amount yet to be determined, for their failure to comply with two court orders.

Defendants appeal, and we affirm.

I.

As a preliminary matter, we state our jurisdiction to entertain all aspects of this appeal. We, of course, have jurisdiction to review the grant of a preliminary injunction by the express language of 28 U.S.C. §1292 (a)(1). We also have jurisdiction to review the district court's denial of defendants' claim of qualified immunity under the holding in Mitchell v. Forsyth, 472 U.S. 511 (1985). We proceed therefore to review the correctness of both rulings.

II.

In concluding to grant a preliminary injunction, the district court correctly considered each of the factors set forth in the leading case in this circuit, Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4 Cir. 1977). There we held that four factors are to be considered: (1) the like-

likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. See Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F. 2d 495, 499 (4 Cir. 1981). As Blackwelder set forth, the two most important factors are the likelihood of irreparable harm to the plaintiff if interim relief is not granted and the likelihood of irreparable harm to the defendant if interim relief is granted. The two factors should be weighed against one another, and if the balance is in favor of the plaintiff, it is proper to grant interim injunctive relief if grave or serious questions are presented for ultimate decision. Blackwelder, 550 F. 2d at 196. See also Jones v. Bd. of Governors of Univ. of North Carolina, 704 F.2d 713, 715 (4

Cir. 1983); Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119, 1124-25 (4 Cir. 1977).

The district court found that there was the likelihood of irreparable harm to the plaintiffs if interim relief were not granted on a dual basis. It found this likelihood as a matter of fact after conducting an evidentiary hearing at which it heard testimony and received other evidence, and it found this likelihood as a matter of law as a sanction for certain defaults and omissions on the part of defendants' lawyers. Because we think that the factual finding of the likelihood of irreparable harm to plaintiffs is not clearly erroneous, we conclude that it is unnecessary for us to consider the appropriateness of the sanction that it be considered as established "that defendants fail to protect effectively children in foster homes where there is reason to know that such children are at risk of harm to their physical

and emotional well-being.^{1/} We express no view of the appropriateness of the additional sanction of attorney's fees and expenses in an amount yet to be determined. While the record reflects some defaults on the part of defendants' counsel, we do not think that this aspect of the case is properly before us until the amount and form of the sanction are fixed.

As a factual matter, plaintiffs presented a statistical study of the case records maintained by the officials on children in foster care prepared by an expert in research methodology and child welfare services. The study documented systemic problems in the Baltimore foster care program with grave consequences to children in the program and great likelihood of irreparable harm. In addition there was testimony by relatives and

^{1/} Order of the district court entered July 27, 1987. J.A. 506.

expert witnesses regarding the cases of sixteen children who had recently been severely abused or neglected, or both, while in foster care. Finally there was testimony from several experts on foster care to the effect that there were systemic deficiencies in the foster care program which placed the children at substantial risk of severe harm, including the testimony of two physicians experienced in the medical care provided to children in foster care, who concluded that defendants were failing to take responsible measures to ensure foster children essential and basic medical care, placing them at risk of severe diseases and other illnesses.

- Defendants sought to counter this proof by attacking the methodology of the statistical sample and evidence of the so-called Report of the Harris Task Force, an internal study, which detailed deficiencies in the foster care program and made recommendations

for their alleviation, together with proof of the corrective actions they had taken. As to the latter, the district court made full and persuasive findings as to why defendants' responses to the problems identified by the Harris Task Force were ineffective and incomplete, we cannot say that these findings lack full evidentiary support. Nor do we think that plaintiffs' statistical study was flawed or that its findings must be disregarded. In our view the statistical sample was significant. It was based on a random selection of 897 of the roughly 4,000 children in the foster program, which was further refined by the use of sampling criteria to a pool of 224 children. The district court found 15 well-founded cases of abuse or neglect in the sample and further indicated that the pool may contain up to 24 additional such cases. We see no abuse of discretion on the part of the district court in affording the study

substantive probative value.

Defendants' proof of irreparable injury to it should interim relief be granted was evidence of the obvious--the monetary cost and administrative inconvenience to the city and state of a more encompassing administration of the foster child care program. In addition they argued to the district court and contend before us that principles of federalism protect them against federal judicial interference in the administration of a state program, absent convincing proof of deliberate indifference on their part to the plight of the victims of maladministration, if any.

We recognize that the considerations pressed on us by defendants are weighty. We note of course that if carried to their logical extreme, federal courts would be powerless to enforce federal rights in any case where enforcement would conflict with the rights of a state. Such is not the law and

we think that, properly applied, the Blackwelder test recognizes that the interests of the state are to be fully respected and overridden only in those instances in which the apparent denial of a federal right is so egregious that the individual right to interim relief outweighs the governmental interest to be free from federal judicial interference. The element of deliberate indifference may be a substantial factor in the aspect of this case which seeks monetary recovery, but it is of little moment with regard to injunctive relief in futuro if plaintiffs can prove that defendants are not acting lawfully. In this case we cannot say that if, as will be later shown, plaintiffs have made a showing of probable success in their claim for permanent relief, the district court improperly balanced the respective rights of plaintiffs and defendants with regard to prospective injunctive relief. Defendants' real harm is

the expenditure of money. Admittedly the supply of money is finite, but balanced against that is the emotional, psychological and physical damage to children, much of which will continue throughout their lives. In short, we see no basis on which to fault the district court on how it balanced the equities and why it concluded that irreparable damage to plaintiffs if relief were not granted outweighed the injury to defendants if relief was granted.

Finally, consistent with Blackwelder, we have no doubt that plaintiffs' case presents a grave and substantial question. Defendants do not seriously contend with respect to prospective relief that if plaintiffs prove their allegations, which they have already demonstrated have an arguably solid foundation, plaintiffs will have proven a violation of their due process rights under the Fourteenth Amendment. See Fox v. Custis, 712

F.2d 84, 88 (4 Cir. 1983) (rights may arise out of special custodial or other relationships created or assumed by the State in respect of particular persons). For the reasons that we will shortly discuss with respect to defendants' claim of qualified immunity, we think that plaintiffs will have also proven a violation of 42 U.S.C. 608(f) (1961) and its subsequent amendments. Thus we affirm the district court's judgment granting a preliminary injunction.

III.

In the district court defendants moved for partial summary judgment on the ground that they were immune to damage claims for action or non-action attributable to them prior to 1980. Later in argument before the district court and before us, they assert immunity even after 1980. Invoking the principle that immunity in the performance of discretionary duties exists where the law

governing official conduct is unsettled, their claim for pre-1980 immunity was grounded on the argument that not until the decision in Martinez v. California, 444 U.S. 277, 285 (1980), was there recognized a constitutional right to protection on the part of persons in the custody of the state, except in the prison context, and that we recognized this uncertain state of the law in Jensen v. Conrad, 747 F.2d 185 (4 Cir. 1984), cert. denied, 470 U.S. 1052 (1985). Their claim for post-1980 immunity is grounded on the argument that even now the law is uncertain as to whether they could reasonably be expected to know that placing children in their custody in an unsuitable foster home could constitute a violation of the constitutional rights of those children.^{2/}

^{2/} Defendants' argument deals only with the constitutional rights of foster children, because defendants argue that the foster children have no statutory rights which are enforceable under 42 U.S.C. §1983. We touch on this argument in the text infra.

The district court placed its denial of the immunity defense on the dual grounds that (a) during the period in litigation, there existed a constitutional right to protection on the part of those in the custody of the state or having a special relationship with the state, even out of the prison context, so that defendants could have reasonably expected to know that a failure on their part to protect foster children placed by them in foster homes selected by them could constitute a violation of plaintiffs' Fourteenth Amendment rights, and (b) since 1961 plaintiffs had a statutory right, enforceable under 42 U.S.C. §1983, to the care and protection that they allege were denied, so that defendants could not be said to exercise discretion in an area in which the law respecting their duties and obligations was uncertain. We agree with the district court that defendants' statutory duty was clear and

certain and therefore they are not entitled to invoke the immunity defense. Our conclusion makes it unnecessary to decide whether plaintiffs' constitutional rights were also violated prior to 1980 if they can prove what they have alleged.

The foster care program in Baltimore City is federally funded. In 1961 the funding statute created both the obligations of those administering the program and the rights of beneficiaries thereunder. That statute was part of the Aid to Families with Dependent Children program in Title IV-A of the Social Security Act, 42 U.S. §608 (repealed by the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272). The original statute required states participating in the foster care program to develop "a plan for each such child [in foster care] (including periodic review of the necessity for the child's being in a

foster family home or child-care institution) to assure that he receives proper care. . . . 42 U.S.C. §608(f) (repealed in 1980). In 1980 and thereafter, the foster care program was made a separate title of the Social Security Act. 42 U.S.C. §§671, 675. Significantly, however, the duty to assure that a child in foster care receives "proper care" was continued and amplified. Titles IV-E and IV-B of the Social Security Act as it now exists contains the following relevant requirements. A State participating in the program is required to have a plan which provides for an agency "responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation,

and protection of civil rights" 42 U.S.C. §671(a)(10).

In addition the eligibility of a State to receive an appropriation is conditioned upon its implementation and operation of "a case review system . . . for each child receiving foster care under the supervision of the State . . ." 42 U.S.C. §627(a)(2)(B). This requirement is repeated and amplified in 42 U.S.C. §671(a)(16), which requires a State's plan to provide for "a case plan. . . for each child receiving foster care maintenance payments . . . [and] a case review system . . . with respect to each such child."^{3/} Finally, 42 U.S.C. §671(a)(9)

^{3/} "Case plan" and "case review system" are both elaborately defined in 42 U.S.C. §675, the relevant text of which follows:

The term "case plan" means a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement

requires a State's plan to provide that

entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. Where appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

The term "case review system" means a procedure for assuring that--

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship

"where any agency of the State has reason to believe that the home or institution in which a child resides . . . is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency."

Taken together we think that these statutory provisions spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied. It is true that the statutes are largely statutes relating to appropriations, but, defendants' argument to the contrary notwithstanding, they are privately enforceable under 42 U.S.C. 1983. See Miller v. Youakim, 440 U.S. 125 (1979); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968). Moreover the Supreme Court did not distinguish between prospective equitable relief and an action for money

damages in regard to the right to enforce privately in Wright v. Roanoke Redevelopment and Hous. Auth., ____ U.S. ____, 107 S.Ct. 766, 770 n.5, 773 (1987).

We therefore conclude that the district court correctly denied defendants' motion for summary judgment on the ground of immunity and we affirm its ruling. We should not be understood, however, to mean that defendants or any of them are necessarily liable for money damages. Their right to claim immunity must be determined by an objective test rather than their subjective good faith belief, see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), and we decide only that objectively, to the extent that they had discretion in the exercise of their duties, they would not be justified in doing or in failing to do what is alleged, if that be proven.^{4/} The proof, however, of the alleged actionable nonfeasance and malfeasance must

await further proceedings in the district
court.

AFFIRMED.

4/ In view of this conclusion we do not consider what
discretion, if any, is vested in any particular defen-
dant in the performance of his duties under the pro-
gram.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

L. J., et al. :

Plaintiffs :

v. : CIVIL NO. JH-84-4409

RUTH MASSINGA, et al. :

Defendants :

MEMORANDUM AND ORDER

Pending before the Court is plaintiffs' complaint alleging, on behalf of themselves individually and as class representatives,

that defendants injured plaintiffs by placing them, with deliberate indifference and gross negligence, into foster homes which they had reason to know were unsuitable in violation of their rights under the Constitution, federal foster care law and Maryland common law.

The immediate matter under consideration is defendants' renewed motion for partial summary judgment filed October 20, 1986 pursuant to Fed. R. Civ. P. 56. The Court has reviewed the pleadings and finds that no hearing is necessary. Local Rule 6(G).

I.

In their motion, defendants contend that they are not liable as a matter of law for damages arising from conduct which occurred prior to 1980. Defendants note that, under Harlow v. Fitzgerald, 457 U.S. 800 (1982), government officials performing discretionary functions are generally shielded from liabil-

ity for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. at 815-819. Defendants then rely on the Court's holding in Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985), for the proposition that defendants are entitled to qualified immunity because the law establishing the right of affirmative protection to those in a custodial or other special relationship with the State was not 'clearly established' until after 1980.

Plaintiffs contend that defendants are not entitled to qualified immunity. They distinguish Jensen v. Conrad, supra, arguing that they have a "special relationship" with the state and, as such, defendants violated a constitutional right to protection that was established well before 1980. Plaintiffs

further contend that they have a long established statutory right to protection under the Social Security Act.

Of the five currently named plaintiffs seeking damages, only two, L.J. and P.G., were in the foster care system in Baltimore prior to 1980. L.J. was voluntarily committed to the foster care system by agreement with his natural mother in 1977. L.J.'s foster mother is alleged to have been unfit for the responsibility of caring for L.J. Specifically, it is alleged that L.J.'s foster mother was a chronic alcoholic who has been treated on over forty-one separate occasions for alcohol-related problems. It is further alleged that the foster mother has a history of serious mental illness including several suicide attempts. According to plaintiffs, the foster home provided L.J. was chaotic. As many as eight children and adults lived in the home and L.J. was

allegedly forced to share a bed with an 85-year-old disabled man. Throughout L.J.'s placement in this home, L.J. is alleged to have suffered both physical and emotional abuse.

P.G. was committed to the foster care system by court order on July 14, 1967 when only two weeks old. After staying in one foster home for two years, P.G. was transferred to a second foster home in March of 1969. The foster parents of the second foster home are alleged to have been unfit to serve as foster parents. It is alleged that P.G.'s medical care was largely neglected. Specifically, in March of 1973, a physician referred P.G. to the Baltimore City Hospital's Ophthalmology Clinic for follow-up of a problem he discovered with her left eye. P.G. was then seen at the Ophthalmology Clinic for several appointments in April and May of 1973, at which time it was diagnosed that she

suffered from amblyopia. After May of 1973, however, P.G. missed numerous appointments at the clinic and, therefore, did not receive proper medical care for her vision problems. Defendants Graves and Zuravin are alleged to have known that P.G. missed appointments at the clinic and that she was not receiving proper medical care. As a result, P.G. is now blind in her left eye. It is alleged that her vision problem was still treatable while she was young. P.G.'s foster mother is also alleged to have suffered from alcoholism and eventually died from complications arising therefrom.

II.

"Good faith" or "qualified immunity" is an affirmative defense that a public official must plead. Gomez v. Toledo, 446 U.S. 635 (1980). In Harlow v. Fitzgerald, supra, 457 U.S. 800, the Court defined the elements of qualified immunity by identifying the circum-

stances in which this defense is not available. The Court noted that "[i]mmunity generally is available only to officials performing discretionary functions" because, "[i]n contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions." 457 U.S. at 816. Moreover, a claim of qualified immunity is also defeated where an official "knew or reasonably should have known" that his conduct violated "clearly established statutory or constitutional rights." Id. at 815-818.

These principles were applied in Jensen v. Conrad, supra, 747 F.2d 185. There the Court heard the appeal of two civil rights actions brought against state and county agency officials on behalf of two children who died after suffering brutal beatings at

the hands of their guardians. Neither of the children were foster children placed in foster homes. One of the two children, Sylvia Brown, had been admitted to a hospital suffering from a fractured skull. At that time, the hospital learned that the mother of the girl had a boyfriend who had "held the child by the head and neck, and slapped the child in a rough manner." 747 F.2d at 187. The hospital reported this to the county department of social services, and the department reached an agreement with the child's mother requiring the mother and the child to reside in the home of Sylvia's grandmother. Under the agreement, if the mother returned to her home with the child, Sylvia would then be placed in the custody of the department. Id. at 187-188. It was alleged that, over the next two months, it was known to the department that the child was living with the mother alone in the mother's home and that no

action was taken to enforce the agreement. Shortly thereafter, the child was brought to the hospital where she was pronounced dead of a brain hemorrhage. The mother subsequently plead guilty to involuntary manslaughter. Id. at 188.

In the case of the second child, Michael Clark, a school principal informed a county department of social services that the child's older brother showed signs of child abuse. A department caseworker met with the older brother immediately and learned from the child that his father hit him on several occasions. The caseworker concluded that a meeting with the mother was necessary; however, after repeated attempts to locate her, the department classified the case as "unfounded." Shortly thereafter, Michael was beaten to death by the mother's boyfriend who was subsequently convicted of the child's murder. Id.

In both the Brown and Clark cases, plaintiffs contended before the district court that a South Carolina statute requiring the reporting of child abuse and certain steps to safeguard endangered children created a "special relationship" between the state and the victims of suspected child abuse. Plaintiffs argued that the special relationship existed because the provisions of the reporting statute placed an affirmative duty on the state government to protect endangered children. Id. at 189. Relying primarily on a previous Fourth Circuit decision, Fox v. Custis, 712 F.2d 86 (4th Cir. 1983), the estates of the children contended this "special relationship" gave rise to a right to affirmative protection by the state under the fourteenth amendment. Id.

In the Brown case, the district court ruled that plaintiff's complaint failed to

state a claim under 42 U.S.C. §1983 because the fourteenth amendment only created a right to affirmative protection by the state where the state had legal custody or control of the victim. Id. at 189-190.

The district court in Clark granted summary judgment in favor of the commissioner of the department of social services and members of the state board of social services because it concluded that there was no clearly established law defining the due process requirements of South Carolina's child protection law in 1980 at the time of Michael Clark's death. Accordingly, these defendants were entitled to good faith immunity. Id. at 189.

As for the caseworkers, however, the district court refused to grant summary judgment in their favor because, unlike the commissioners and board members, their activities were not discretionary and thus not subject to qualified immunity. The court

wrote:

The same argument, however, cannot be made in favor of the caseworkers. The obligations of protective service caseworkers are specifically defined in Section 20-7-650. The requirements which must be satisfied are clearly established, thereby providing proper notice. Therefore, caseworkers who act in violation of these requirements cannot be reasonably held to have acted in "good faith." None of the purposes behind the Harlow objective good faith immunity rule would be served by such a decision. When a governmental official acts in violation of a specific statute which has a direct bearing on his official conduct and of which it is reasonable to expect him to be knowledgeable, a resulting lawsuit cannot be reasonably characterized as "insubstantial." Nor will holding that official liable in such a case constitute unfair punishment or place undesirable restraints on his flexibility.

Administratrix for the Estate of Clark v. Jensen, 570 F.Supp. 114, 127 (D.S.C. 1983), aff'd, 747 F.2d 185 (4th Cir. 1984). The Fourth Circuit declined to review the denial of summary judgment as to these defendants. 747 F.2d at 187 n.1.

On appeal, the Court of Appeals first stated that the threshold issue was "whether the fourteenth amendment affords the appellants a right to affirmative protection by

the state, and if such a right presently exists, whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under Harlow." 747 F.2d at 190.

The court noted that the debate over affirmative duty stems in large part from Estelle v. Gamble, 429 U.S. 97 (1976), where it was held that prison officials could not act with "deliberate indifference" toward the medical needs of prisoners. Id. The Court of Appeals further noted that in Estelle, the Supreme Court had reasoned that since the prisoner was, because of the deprivation of his liberty, unable to care for himself, it was only just that the public be required to care for him. 747 F.2d at 191 (citing Estelle, supra, 429 U.S. at 103-104).

Calling it the "first major post-Estelle decision," the Court then reviewed Martinez

v. California, 444 U.S. 277 (1980). In that case, the Court addressed the question of whether the State of California had an affirmative duty under the fourteenth amendment to protect a private citizen from a mentally disturbed sex offender who had been sentenced to twenty years, but paroled after five. In ruling that the plaintiff had failed to state a §1983 claim, the Martinez Court chose not to decide the plaintiff had a constitutional right to protection under the fourteenth amendment. Rather, the Court held that the plaintiff had failed to establish proximate cause because the parolee was not the agent of the parole board and the victim had been murdered five months after the parolee's release. 747 F.2d at 191 (citing Martinez, 444 U.S. at 285).

In reviewing the Martinez decision in Jensen, the Court of Appeals placed special emphasis on the last paragraph of the

Martinez decision by quoting it as follows:

We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

747 F.2d at 192 (quoting Martinez, 444 U.S. at 285).

The Jensen Court then noted that in 1981 the Second Circuit attempted to resolve the question left open by Martinez in Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) (Doe I). Significantly, the allegations in the Doe case are similar to those in the case at hand. In Doe, foster children in the custody of the State of New York were beaten and sexually abused by their foster fathers. The children filed suit in 1979 alleging that the state violated an affirmative duty of protection when it failed to inspect and recertify the

foster homes to which they had been assigned over a period of time running from 1964 to 1977. The Jensen Court wrote of the decision in Doe that:

Without expressly mentioning the fourteenth amendment, the court held that the State could violate a "constitutionally protected liberty or property interest" by failing to protect an individual who had been placed in the government's "custody or care." In its discussion the court cited Estelle v. Gamble and other eighth amendment prisoner cases. This citation was significant, for it marked the first time that the eighth amendment analysis had been applied to a traditional fourteenth amendment claim involving liberty and property interests.

747 F.2d 192 (citing Doe, 649 F.2d at 141).

The Jensen Court continued that "[o]ne year later, Seventh Circuit refused to distinguish Martinez, ruling that "there is no constitutional right to be protected by the State against being murdered by criminals or mad men." 747 F.2d at 192 (quoting Bowers, 686 F.2d at 618). Nevertheless, the Jensen Court pointed out that in deciding Bowers, the Seventh Circuit "was careful to limit its holding to situations where the state had not

taken an active role in placing an individual in a position of danger." 747 F.2d at 192. The Court then quoted Bowers where it is written:

We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. (quoting Bowers, 686 F.2d at 618).

The Court went on to emphasize that "[i]t was here, the [Bowers] Court reasoned, that a fourteenth amendment claim based on an affirmative duty overlapped with the affirmative duty recognized by the Supreme Court in eighth amendment prisoner cases." 747 F.2d at 192. The Court in Jensen went on to point out that:

Significantly, the court did not draw a distinction between "custodial" and "other" relationships. In this sense, Bowers moved one step beyond Doe. Rather than implicitly limiting governmental liberty to custodial relationships the Bowers court chose to speak in broader terms;

in the court's view, it was not the precise type of relationship that mattered, but whether the government had placed an individual in danger.

747 F.2d at 193.

Having reviewed Estelle, Martinez, Doe and Bowers, the Court turned its attention to its own opinion in Fox v. Custis, supra, 712 F.2d 86, where the Fourth Circuit followed the same analytical approach adopted in Bowers. 747 F.2d at 193. In Fox, a young woman suffered injuries when a parolee set fire to her house. The parolee had previously been sentenced to twenty years in prison as the result of a prior arson conviction. Nevertheless, despite several violations of his parole, parole was not revoked.

The Court first decided that, as in Martinez, the injuries suffered by the victim in Fox were too remote to constitute a deprivation of constitutional rights under S1983. 747 F.2d at 193 (citing Fox, 712 F.2d

at 87). Nevertheless, because the case in favor of finding proximate cause was stronger than in Martinez, the Court decided to examine whether the plaintiff had asserted a cognizable constitutional claim under the fourteenth amendment. In reviewing Fox, the Jensen Court emphasized that "[c]iting Bowers, we held that a duty could arise out of a special 'custodial or other relationship.'" 747 F.2d at 193. The Court then quoted its decision in Fox as follows:

With one qualification, we agree with the Seventh Circuit's recent holding that, in general, there simply is "no constitutional right to be protected by the state against ... criminals or madmen," and that because in corollary, there is no "constitutional duty [on the state] to provide such protection, its failure to do so is not actionable under section 1983." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The qualification--an important one actually acknowledged by the Bowers court, id.--is that such a right and corollary duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons. For example--as we have held in this circuit--such a right/duty relationship may arise under §1983 with respect to inmates in the state's prisons or patients in its mental institutions whom the state knows to be under specific risk of harm from themselves or others in the state's custody or subject

to its effective control. Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (inmate under observed attack by another inmate); Woodhouse v. Virginia, 487 F.2d 889 (4th Cir. 1973) (same as Withers); cf. Orpiano v. Johnson, 632 F.2d 1096, 1101-03 (4th Cir. 1980), cert. denied, 450 U.S. 929, 101 S.Ct. 1387, 67 L.Ed.2d 361 (1981) (no right where no pervasive risk of harm and specific risk unknown); see also Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Gann v. Delaware State Hospital, 543 F.Supp. 268, 272 (D.Del. 1982); Walker v. Rowe, 535 F.Supp. 55 (N.D.Ill. 1982) (duty of state to protect guards).

Id. at 193 (quoting Fox, F.2d, 712 F.2d at 88).

Most important for the case at hand is the Jensen Court's declaration of how the Fox decision expanded on prior case law. First the Court noted that Fox "completed the convergence of eighth and fourteenth amendment analysis that had begun in Doe and took shape in Bowers." Id. The constitutional right recognized by the Court in Fox "was clearly based on the fourteenth amendment, but the shape and definition that we gave to that

right by using the term 'custodial or other relationship' was influenced in large part by the consideration that lay behind the eighth amendment cases." Id. at 193-194. The Court added:

Recognizing that the fourteenth amendment could not be read to establish a general affirmative duty to the public at large, we chose to limit that duty by applying a rationale similar to that used in Estelle: namely, that where the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an "active tortfeasor" to make it only "just" that the state be charged with an affirmative duty of protection. Bowers and Doe also made use of the eighth amendment analysis to address the fourteenth amendment issue, but Fox acknowledged more candidly and expressly than either Doe or Bowers the concerns that had helped to shape the contours of the duty imposed on the government.

747 F.2d 194.

The second important expansion over prior precedent contained in the Fox ruling was that "it stated in terms more explicit that Bowers that a right to affirmative protection need not be limited by a determination that there was a custodial relationship." The Fox Court ruled that "a right to

protection could arise from a custodial or other relation necessary to define the type of noncustodial relationship required to give rise to a right to affirmative protection.

The Court in Jensen held that the defendants were entitled to qualified immunity because, when the two children -- who were not in the defendants' custody -- were murdered in 1980, there was no clearly established right to affirmative protection owed to them of which the defendants should have known. "We hold only that under the facts of this case neither the state and county board members nor the caseworkers could reasonably have been expected to know that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their fourteenth amendment rights." 747 F.2d at 195. The Court in closing, however, noted that "[w]ere the issue properly before this court on different facts, there would be nothing to

preclude further definitions of the meaning of that term followed by a ruling that the facts of the case fell within the meaning of special 'relationship.'" Id. at 195.

Although the Court found it unnecessary to provide a comprehensive definition of "special relationship," in a footnote, the Court "underscored" three factors that it stated "should be included in a 'special relationship' analysis." Id. at 194 n.11. These factors are (1) "[w]hether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident"; (2) "[w]hether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals"; and (3) "[w]hether the State knew of the claimants' plight." Id.

In discussing the significance of custody, the first factor, the Court suggested

that had Sylvia Brown and Michael Clark been in the state's custody, a "special relationship" giving rise to an affirmative right to protection would have existed. The Court explained that under the facts in Jensen, "as in Fox and Martinez and unlike the situations in Withers [v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980)] and Woodhouse [v. Virginia, 487 F.2d 889 (4th Cir. 1973)]], the claimants were members of the general public and not in custody. The state defendants were unaware that they, as opposed to anyone else in the public at large, faced a special danger. This fact, combined with the lack of a past or present custodial relationship between the state and the perpetrators, would argue against finding that a special relationship existed." Id.

III.

Plaintiffs in the present case are foster children who were in the state's

custody at the time they allege to have been injured. It is alleged that these children were placed in foster homes, which defendants knew or should have known were unsuitable and likely to cause them injury. It is further alleged that although defendants had reason to know the foster care placements of these children were endangering them, defendants did not remove the children from those placements.

Defendants contend that Jensen is controlling authority for the proposition that, prior to 1980, the plaintiffs had no clearly established right to protection from the state while in the state's custody as foster children. As the above narration demonstrates, the focus of the Court in Jensen, was on the establishment of the rights of those not in custody to affirmative protection by the state. Unlike the allegation of plaintiffs in the present case,

the children in Jensen were not in the state's custody and had not been placed in their dangerous environment by the state. The Court in Jensen, therefore, never had before it the question of when the right of someone in custody to affirmative protection first became clearly established.

Since the children in Jensen were not in custody, the great thrust of the Court's decision was toward determining when those not in custody first had an affirmative right to protection and toward analytical basis for defining when an individual not in custody has such a "special relationship" with the state such that he is entitled to affirmative protection. The true meaning of the Jensen decision was further amplified in the first major interpretation of the decision since its issuance. In Estate of Bailey by Oase v. County of York, 768 F.2d 503 (3d Cir. 1985), a civil rights complaint was brought against

a county welfare agency by the father of a five-year-old girl who was beaten to death by her mother and mother's boyfriend. The welfare agency had previously determined that the child had been abused and agreed to return the child to the mother only upon the condition that the boyfriend be denied access to the child. The complaint alleged that the agency returned the child to the mother without conducting an independent investigation to determine whether the child's mother and mother's boyfriend were living together.

Since the child was not in custody, the District Court found that the child did not have a right to protection and dismissed the complaint. The Third Circuit began its analysis, recognizing that in Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) (Doe I), the Second Circuit held that "an agency that placed a child in foster care could be liable for the

child's sexual abuse by her foster parent because the agency failed to adequately supervise placement." 768 F.2d at 509 (citing Doe, (649 F.2d at 145-147)). The Third Circuit chose not to address the holding in Doe, but noted that the District Court declined to follow that case because in Doe the child had been in custody.

The Third Circuit noted that the District Court had, instead, relied on Jensen in holding that plaintiff had failed to state a claim because the child in question was not in custody. The Third Circuit went on to review and comment on Jensen as follows:

— In Jensen the Fourth Circuit rejected the argument that a right of protection can never exist in the absence of a custodial relationship, and instead reaffirmed "that a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship,'" 747 F.2d at 194 (citing Fox v. Custis, 712 F.2d 84 (4th Cir. 1983)). Because the court found immunity dispositive, it stated it was unnecessary to define the type of relationship required to give rise to a right of protection. It clearly suggested, however, that such a "special relationship" would exist under facts similar to those here. The factors it considered relevant were

whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight. Id. at 194-95 n.11. The court stated, "Were the issue properly before this court on different facts, there would be nothing to preclude further definition of the meaning of that term followed by a ruling that the facts of that case fell within the meaning of 'special relationship.'" Id. at 195.

768 F.2d at 509. The Court concluded that "[s]ince neither of the children in the Jensen case was in the custody of the state or county agencies sued, the Fourth Circuit opinion undercuts the principal precedent on which the district court relied here." Id. at 510. Accordingly, the Third Circuit reversed the District Court. Other Courts have similarly interpreted the significance of the Jensen decision. Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986) (children of victim of a barroom shooting were not entitled to a duty of protection because no special relationship existed between them and defendants); Dudosh v. City of Allentown, 629

F.Supp. 849 (E.D. Pa. 1985) (administrator of murder victim's estate adequately stated a claim against police by alleging failure to provide adequate police protection).

Nowhere in Jensen does the Fourth Circuit state that individuals in custody did not have a clearly established right to protection prior to 1980. Indeed, the Court implied that had the two children in Jensen been in custody, a "special relationship" would have existed and a duty of protection found owing to them by the state in 1980. In fact, the Court emphasized that "[w]e hold only that under the facts of this case neither the state and county board members nor caseworkers could have been expected to know that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their fourteenth amendment rights." 747 F.2d at 195. In note 11, the Court suggested that the essential fact

change that would have changed its ruling was a factual allegation that the children were in custody as opposed to not being in custody. There the Court emphasized the importance of "custody" as a factor establishing a "special relationship" in noting that "[h]ere, for example, as in Fox and Martinez and unlike the situations in Withers and Woodhouse, the claimants were members of the general public and not in custody." Accordingly, "[t]he state defendants were unaware that they, as opposed to anyone else in the public at large, faced a special danger." And "[t]his fact, combined with the lack of a past or present custodian relationship between the state and the perpetrators, would argue against finding that a special relationship existed." Id. at 194-195 n.11.

In implying its finding would have been different had the children been in custody, the Court also, necessarily, suggested that a

right to protection for those in custody existed prior to 1980.

Moreover, a basic message of the Jensen opinion is that the expanded right of protection that was extended to those not in custody as of 1980 had its legal foundation in an already established duty of protection owed to those in custody. Indeed, the Court noted that in its previous decision in Fox, "[r]ecognizing that the fourteenth amendment could not be read to establish a general affirmative duty to the public at large, we chose to limit that duty to applying a rationale similar to that used in Estelle; namely, that where the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an 'active tortfeasor' to make it only 'just' that the state be charged with an affirmative duty of protection." 747 F.2d at 194.

That the right to protection for those in custody was established well prior to 1980 was made clear by the Court when it reviewed its prior decision in Fox. The Court noted that in Fox it agreed with the Seventh Circuit decision in Bowers that there is "'no constitutional right to be protected by the state against ... criminals or madmen.'" 747 F.2d at 193 (quoting Bowers, supra, 686 F.2d at 618). However, the Fox Court expressed one qualification to its acceptance of the Bowers holding: "The qualification--an important one actually acknowledged by the Bowers court, ...--is that such a right and corollary duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons." 747 F.2d at 193. The Court went on to point out that "as we have held in this circuit--such a right/duty relationship may rise under §1983 with respect to inmates in

the state's prisons or patients in its mental institutions whom the state knows to be under specific risk of harm from themselves or others in the state's custody or subject to its effective control." Id. The Court then cited several cases including its own 1973 decision in Woodhouse v. Virginia, 487 F.2d 889 (4th Cir. 1973), where it was held that prison inmates under known risk of harm from homosexual assaults by other inmates had a right to protection. Also cited was the 1974 case of Spence v. Staras, 507 F.2d 554 (7th Cir. 1974), where an inmate in a state hospital was beaten to death by other inmates. The administratrix of the decedent's estate brought an action under §1983 alleging that decedent's fourteenth amendment rights had been violated, and the Court ruled that the complaint adequately stated a cause of action.

Furthermore, in Doe v. New York City

Dept. of Social Services, supra, 649 F.2d 131, it was held that an agency that placed a child in foster care could be liable for the child's sexual abuse by her foster parent under §1983 because the agency failed to adequately supervise the child's placement. Significantly, the alleged inadequate supervision took place over a period extending from 1964 to 1977. The Court necessarily found, therefore, that at some point during that period the child had a right to protection. It was alleged that child abuse had taken place in 1971. See also Doe v. New York City Dept. of Social Services, 709 F.2d 782 (2d Cir.) (Doe II), cert. denied, 464 U.S. 864 (1983) (where the court upheld a jury verdict of \$225,000 in the second trial of the same case).

Other cases further indicate that a right to protection as to the plaintiffs in this case existed well before 1980. In Gary

W. v. State of Louisiana, 437 F.Supp. 1209 (E.D. La. 1976), an action was brought on behalf of mentally retarded, physically handicapped and delinquent children challenging the adequacy of their placements in out-of-state institutions. Although the Court did not address whether the children had a due process right to protection, it seemingly went further holding that these children had a constitutional right to treatment. 437 F.Supp. at 1216. The Court reasoned that "[i]f an individual adult or child, healthy or ill, is confined by the government for some reason other than his commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty." Id. at 1216. Therefore, "when the state chooses, for the most humane motives, to offer or require institutional confinement of a person, it must consider means that are capable of

achieving its purposes in ways that are least stifling to personal liberty, and it must offer a therapeutic consideration, a quid pro quo, for the deprivation." Id. at 1217.

Certainly, if the children in Gary W. had a right to treatment, they also had a right to be protected. Furthermore, the reasoning in Gary W. appears applicable to foster children who are placed by the state in foster homes selected by the state and pledged to be continually monitored by the state.

The constitutional right to protection under the Fourteenth Amendment was found to exist as early as 1973 in a case factually similar to Gary W. In New York St. Ass'n for Retarded Child, Inc. v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973), the Court held that residents of state institutions for the mentally retarded were entitled to certain basic rights including the right to protec-

tion. The Court reasoned:

Persons who live in state custodial institutions are owed certain constitutional duties by the state and its officials. In recent years there has been a great increase in the number of federal court cases involving inquiries into the conditions in state penal institutions and recognition that the federal Constitution does not cease to protect a man when he enters prison. See generally Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, 23 Stan.L.Rev. 473 (1971); Hirschkop and Milemann, The Unconstitutionality of Prison Life, 55 U.Va.L.Rev. 795 (1969).

With respect to persons confined under the criminal law, the standard has been succinctly stated by Circuit Judge Kaufman that a tolerable living environment is now guaranteed by law. Book Review, 86 Harv.L.Rev. 637, 639 (1973), citing Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), on remand, 321 F.Supp. 127 (N.D.N.Y. 1970), aff'd in part and rev'd in part, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 (1972).

* * *

However, since persons residing in state institutions other than prisons may not be constitutionally "punished" (Robinson v. California, supra), some conditions tolerated in prisons may not be permissible in other institutions. Lollis v. New York State Dep't of Social Services, 328 F.Supp. 1115, 1118 (D.C. 1971), modifying, 322 F.Supp. 473 (S.D. N.Y. 1970).

357 F.Supp. at 764.

The Court concluded "[o]ne of the basic

rights of a person in confinement is protection from assault by fellow inmates or by staff." Id. "Another is the correction of conditions which violate 'basic standards of human decency.'" Id. at 765 (citing Brenneman v. Madigan, 343 F.Supp. 128, 133 (N.D. Cal. 1972)). Furthermore, the Court noted that the rights of these patients may rest on the Eighth or the Fourteenth Amendment. Id. at 764.

Certainly, the constitutional right to protection and its corollary duty to protect owed to prisoners and patients confined to institutional hospitals is no less deserved to foster children removed from the parents by the state and placed in foster homes approved and monitored by the state. The right to protection was clearly established by the time of the Supreme Court's 1976 decision in Estelle v. Gamble, supra, 429 U.S. 97. Moreover, earlier cases such as

Gary W., Rockefeller, Woodhouse and Staras demonstrate that this right was first clearly established as early as 1974. Accordingly, the defendants in this action could have been reasonably expected to know that their alleged failure to protect foster children placed by them in foster homes selected by them constituted a violation of plaintiffs' fourteenth amendment rights.

IV.

The violation of an established federal statutory right will also deprive a defendant of qualified immunity. Harlow v. Fitzgerald, supra, 457 U.S. at 818. In this regard, plaintiffs allege that defendants' actions prior to 1980 violated their clearly established rights under § 408, Title IV-A of the Social Security Act, 42 U.S.C. § 608. Accordingly, plaintiffs contend that defendants are not entitled to qualified immunity for their pre-1980 conduct. Citing Pennhurst State School v. Haldeman, 451 U.S. 1 (1980), defendants contend that § 408 of Title IV-A is merely a funding statute and does not, therefore, create rights in favor of plaintiffs such that it may serve as a proper basis for a §1983 claim.

The Aid to Families with Dependent Children-Foster Care ("AFDC-FC") program was first enacted in 1961 and authorizes federal

subsidies for the support and care of children who are made wards of the state pursuant to a court order.¹ 42 U.S.C. § 608. Section 408 of the Act and its implementing regulations establish federal standards that must be met by a state agency as prerequisites to receiving federal AFDC-FC funds. Specifically, § 408(f) requires an agency to develop a "plan" tailored to the needs of each child that will assure the child receives proper care. Periodic review of the necessity of retaining the child in foster care and the appropriateness of the care being provided is also required.

It is, in fact, well established that private individuals may bring suit to vindicate their rights under the Aid to Families with Dependent Children ("AFDC")

¹ The AFDC-FC program was repealed, effective October 1, 1982, by the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272.

program. In Rosado v. Wyman, 397 U.S. 397 (1970) a class action was brought on behalf of a recipient challenging a New York statute that altered the standard-of-need computation under the AFDC program. Plaintiffs contended that the statute violated equal protection in that family recipients in some areas received lesser payments than in others. In addressing who may bring action to enforce provisions of the AFDC, the Court wrote:

We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Association of Data Processing Service Organizations v. Camp, ante, p. 150; Barlow v. Collins, ante, p. 159.

397 U.S. at 420.

Rosado relied on King v. Smith, 392 U.S. 309 (1968), where a class action was successfully brought to overturn an Alabama's "sub-

stitute father" regulation under which AFDC payments were denied to the children of a mother who lived with an able-bodied male. Significantly, King was a §1983 action brought by AFDC recipients. Indeed, the King decision was later cited in Pennhurst State Schools v. Haldeman, supra, 451 U.S. at 17-18, as an example of a prior case where a statute enacted under the spending power was held to have granted privately enforceable rights to recipients.

In Miller v. Youakim, 440 U.S. 125 (1979), the Court reviewed §1983 brought to vindicate the rights of recipients under the same federal foster care provision at issue here. In Miller, four foster children were removed from their mother's home following a court determination of neglect. Two of the children were placed in the home of their older sister and her husband. The home of the older sister was approved as meeting the

licensing standards for foster family homes; however, the state refused to make AFDC-FC payments for the children's support because the children were related to their foster parents. In ruling that the state's distinction between related and unrelated foster homes was contrary to the intent of Congress, the Court emphasized that:

The specific services offered by the AFDC-FC program further indicate that Congress did not intend to distinguish between related and unrelated foster caretakers. Congress attached considerable significance to the unique needs and special problems of abused children who are removed from their homes by court order, distinguishing them as a class from other dependent children:

"The conditions which make it necessary to remove [neglected] children from unsuitable homes often result in needs for special psychiatric and medical care of the children....

"These are the most underprivileged children and often have special problems...." 108 Cong. Rec. 12692-12693 (1962) (remarks of Sen. Eugene McCarthy)."

Section 408 embodies Congress' recognition of the peculiar status of neglected children in requiring that States continually supervise the care of these children, § 408(a)(2), develop a plan tailored to the needs of each foster child "to

assure that he receives proper care," § 408(f)(1), and periodically review both the necessity of retaining the child in foster care and the appropriateness of the care being provided. See *ibid.*; 45 CFR §§220.19(b), (c), 233.110 (a)(2)(ii) (1977). Additionally, the States must work to improve the conditions in the foster child's original home or to transfer him to a relative when feasible, § 408(f)(1); see *supra*, at 137. This procedure comports with Congress' preference for care of dependent children by relatives, a policy underlying the categorical assistance program since its inception in 1935. See S. Rep. No. 628, 74th Cong., 1st Sess., 16-17 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess., 10-12 (1935); *Burns v. Alcala*, 420 U.S., at 581-582; § 401, as amended, 42 U.S.C. § 601, *supra*, at 132-133. We do not believe that Congress, when it extended assistance to foster children, meant to depart from this fundamental principle. Congress envisioned a remedial environment to correct the enduring effects of past neglect and abuse.

Accordingly, the AFDC-FC was not merely a funding statute. Upon the enactment of the AFDC-FC program in 1961, children who met the eligibility requirements had a right to proper care and placement in a safe foster home. These statutory rights were, therefore, clearly established prior to 1980 and at all times relevant to these proceedings. If the defendants in this action did not know of the existence of these statutory rights,

they certainly should have know of these statutory rights, they certainly should have known of their existence.²

² Two of the six plaintiffs were put in foster homes pursuant to voluntary placement agreements. The disposition of their claims premised on a statutory violation, § 408 of Title A, 42 U.S.C. § 608, differs significantly from the statutory claims of plaintiffs who were placed in foster care involuntarily. Beginning in 1961, children made wards of the state pursuant to a court order fell under the definition of "dependent child" contemplated by the statute. In 1961, § 408(a) stated that the term "dependent child" shall include a child who was removed from the home of the natural parents as a result of judicial determination to the effect that continuation of such would be contrary to the welfare of the child. On June 17, 1980, the definition was amended to include children subject to voluntary placement agreements.

Plaintiff L.J. has been in foster care pursuant to a voluntary placement agreement since 1977. Consequently, any claim asserted by L.J. premised on a statutory violation would fail as to violations said to have occurred prior to 1980. The second child who was not placed pursuant to a Court order is O.S. Since this child became a foster child in January, 1984, a claim of O.S. alleging violation of his statutory rights would exist at all times of the alleged violations.

Importantly, plaintiff L.J.'s claim against the state under the existence of an affirmative duty of protection survives as to those allegations not covered by statute.

V.

Furthermore, the AFDC-FC is now well established as a proper basis upon which to pursue a §1983 action. Miller v. Youakim, supra, Lynch v. King, 550 F.Supp. 325 (D.Mass. 1982), aff'd, 719 F.2d, 504 (1st Cir. 1983).

Accordingly, it is this 27th day of July, 1987, by the United States District Court for the District of Maryland, ORDERED:

1) That defendants' motion for partial summary judgment BE, and the same hereby IS, DENIED; and

2) That the Clerk mail copies of this Memorandum and Order to counsel of record.

/S/

Joseph C. Howard
United States District Judge

§ 608. Payment to States for foster home

care of dependent children; definitions

Effective for the period beginning May 1, 1961--

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and

which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such voluntary placement agreement or judicial determination, and (4) who (A) received aid under such State plan in or for the month in which such agreement was entered into or court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such agreement was entered into or such proceedings were initiated, would have received such aid in or for such month if in such month he

had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section--

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only

those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a)

(3) of this title; but only with respect to a State whose State plan approved under section 602 of this title--

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic

review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 and 728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For the purposes of this section, the term "foster family home" means a foster family home for

children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing; but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

For the purpose of this section, the provisions of subsections (d), (e), (f), and (g) of section 672 of this title shall apply.

§ 627. Foster care protection required for additional payments

(a) Requisite additional steps to qualify

If, for any fiscal year after fiscal year 1979, there is appropriated under section 620 of this title a sum in excess of \$141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the amount for which it would be eligible if such appropriation were equal to \$141,000,000, unless such State--

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary--

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

(b) Reduction of allotment

If for each of any two consecutive fiscal years after the fiscal year 1979, there is appropriated under section 620 of this title a sum equal to \$266,000,000, each State's allotment amount for any

fiscal year after such two consecutive fiscal years shall be reduced to an amount equal to its allotment for the fiscal year 1979, unless such State--

(1) has completed an inventory of the type specified in subsection (a)(1) of this section;

(2) has implemented and is operating the program and systems specified in subsection (a)(2) of this section; and

(3) has implemented a preplacement preventive service program designed to help children remain with their families.

(c) Presumption

Any amounts expended by a State for the purpose of complying with the requirements of subsection (a) or (b) of this section shall be conclusively presumed to have been expended for child welfare services.

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at

the State or local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to

assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance,

in case or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under

this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter;

(11) provides for periodic review of the standards referred to in the preceding paragraph and

amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any

time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet the requirements described in section 675(5)(B) of this title with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans ap-

proved under parts A and D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.

§ 675. Definitions

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. Where

appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

* * *

(5) The term "case review system" means a procedure for assuring that--

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the

case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship; and

(C) with respect to each such child, procedural safeguards will be applied among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the

child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.

No. 87-1796

(3)

Supreme Court, U.S.

FILED

JUN 1 1988

JOSEPH F. SPANIOLO
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L. J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are social workers deprived of the defense of qualified immunity and subject to private actions for damages under 42 U.S.C. § 1983, because the foster care funding provision of the Social Security Act enacted in 1961 "clearly established" legal duties enforceable by suits against them for alleged breaches of that Act?

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No. 87-1796

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RUTH MASSINGA, et al.,

Petitioners,

v.

L. J., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondents L.J., P.G., O.S., M.S.
and C.S. respectfully request that this
Court deny the petition for a writ of
certiorari to review the judgment of
the United States Court of Appeals for
the Fourth Circuit in this case.

STATEMENT OF THE CASE

In the complaint filed in this
action (as amended), the five
children who are respondents here
sought declaratory and injunctive
relief on behalf of themselves and a
class of children in foster care under
the custody of the Baltimore City
Department of Social Services. The

district court granted a preliminary injunction on behalf of the class on July 27, 1987, and the parties submitted to the trial court a proposed consent decree settling the equitable claims in the case on April 25, 1988. A fairness hearing on that settlement is to be held on July 18, 1988.

The named plaintiffs also sought, individually, damages for injuries that they had suffered while in the custody of the Baltimore City Department of Social Services.

The children had been removed from the homes of their parents because of parental abuse and neglect or inability to care for the children. Appendix at 25-27. They were placed in foster homes by the city agency in order to receive substitute care and supportive and rehabilitative services. Id.

The children allege that they suffered severe injuries while in the foster care program of the city agency. The defendants placed them in foster homes which defendants failed to screen and supervise adequately to determine their appropriateness and safety. The children were physically and emotionally abused in those homes. There was sexual abuse of very young children and repeated brutal beatings. Despite receiving reports from doctors, school personnel, and others that the children were being abused and neglected in the foster homes, defendants did not act to remove them from these homes. Defendants did not report the homes for investigation by the appropriate law enforcement agency. Several of the children remained in these abusive foster homes for years, never or infrequently visited by an

employee of the city agency. Defendants provided the plaintiff children little, if any, medical or mental health care. Appendix at 50-112.

In the case of P.G., for example, the city agency requested from and was granted by the juvenile court custody of two-week old P.G. because of the failure of her mother to provide necessary medical care for P.G.'s older siblings. P.G. was then placed by the city agency in one of its foster homes, where she received little supervision or medical care. Ten years later, she was still in the agency's custody and was blind in one eye from a curable eye disease that went untreated. Appendix at 108-117. In the case of M.S., the city agency was granted custody of her because she was sexually abused in her

mother's home. The agency placed her in one of its foster homes where she was sexually abused by the foster father. Appendix at 88-89.

The children allege that the injuries they sustained occurred "because of the willful and intentional acts, policies and omissions, or gross and wanton negligence, or deliberate indifference of the defendants." Appendix at 143.

The children sued the Baltimore City Department of Social Services, officials and employees of that agency and officials of the Maryland Department of Human Resources, in their official and personal capacities. The foster care program in Maryland is financed through federal appropriations made available to the states under the provisions and conditions of the Social Security Act, 42 U.S.C. §§601, et seq.

On January 30, 1985, the city and state defendants jointly filed a motion "for partial summary judgment on the issue of defendants' liability for damages arising from conduct which occurred prior to 1980." Defendants' Motion for Partial Summary Judgment. They asserted that their constitutional duties to foster children were not clearly established before that year.

The defendants filed no accompanying affidavits to refute any factual allegations of the complaint, but, for purposes of the motion, took those allegations as true. After plaintiffs amended their complaint to add statutory claims for the pre-1980 period, the defendants on October 20, 1986 filed a renewed motion for partial summary judgment, again claiming they were entitled to qualified immunity for pre-1980 acts and omissions.

Defendants argued that their constitutional duties were not clearly established and that federal foster care law was not privately enforceable during the pre-1980 period. On July, 27, 1987, the district court denied the motion for partial summary judgment, holding that defendants "could have been reasonably expected to know that their alleged failure to protect foster children placed by them in foster homes selected by them constituted a violation of plaintiffs' fourteenth amendment rights," and that foster children's federal statutory rights to specified protections were clearly established "prior to 1980 and at all times relevant to these proceedings" and were privately enforceable.

Appendix to the Petition at 64a, 70a.

Defendants appealed to the United States Court of Appeals for the Fourth

Circuit from the denial of their motion and there argued for the first time that they were entitled to qualified immunity for their post-1980 as well as their pre-1980 acts and omissions. The Court of Appeals held that they were not entitled to qualified immunity for their activities during either period since their statutory duties to foster children were clearly established. Because of this holding as to statutory duties, the Court did not reach the issue of when the constitutional duties of the defendants to the foster children were clearly established.

REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION

The question presented as set forth in the petition is very narrow: whether "social workers" are entitled to qualified immunity from damages when

sued under 42 U.S.C. § 1983 for violation of the foster care provision of the Social Security Act enacted in 1961 and repealed in 1980. It involves a repealed provision of law and the liability of only some of the defendants.

This question is not even central to the instant lawsuit and does not merit the granting of certiorari. The claims for damages of the children are not primarily based on this pre-1980 statute. Three of the five children seeking damages were not even in foster care prior to 1980, and the others have claims which arise from post-1980 as well as pre-1980 activities.

Furthermore, the question presented addresses only the liability of "social workers," although the children sued other officials of the state and of the city, including the

directors of the state and city child welfare agencies.^{1/} Petitioners here are apparently only the social worker defendants, but defendants made no attempt to show, and the lower courts did not determine, that social workers of the Baltimore City Department of Social Services were exercising discretionary functions for which they might be entitled to raise qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Although narrowly presenting the issue below and in the Question

^{1/} The Petition nowhere indicates which of the parties below have filed it. The petitioners' phrase "social workers" is presumably not inclusive of all defendants below, but there is no way to ascertain which of the defendants has petitioned for certiorari.

Presented here as involving the pre-1980 law, the petitioners suggest, at other points in their petition, that they wish to raise immunity with respect to foster care provisions enacted in 1980 and now in effect, and to raise the issue of immunity for all of the defendants below, not just the "social workers." Petition for a Writ of Certiorari at 17, 21. However, the question before the Court is limited to that stated in the petition and does not encompass these issues. Supreme Court Rule 21.1(a).

In the body of their petition, the social workers argue extensively that there is no cause of action at all for damages under §1983 for violations of federal foster care provisions. This alleged failure to state a cause of action is not before this Court on an interlocutory appeal, which can raise

only the question of qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 2816 (1985).

Furthermore, the rationale for allowing an interlocutory appeal of a ruling on qualified immunity is a limited one: to save officials the hardship of preparation for and participating in a trial. Mitchell, 472 U.S. 511, 105 S Ct. at 2815 (1985). That purpose would not be served by the granting of a writ in this case. The defendants have never requested a stay, and the parties are proceeding with discovery, which the district court has ordered be completed by December 1, 1988. The trial date is to be set on June 27, 1988.

Even if these deficiencies in the petition are overlooked, there is no issue warranting a grant of certiorari,

as discussed below. There is no split in the circuits on the question presented, nor is there any important, unresolved question of federal law. Supreme Court Rule 17.1.

I. THE COURT OF APPEALS — CORRECTLY APPLIED PRECEDENT FROM THIS COURT IN DENYING THE HARLOW V. FITZGERALD QUALIFIED IMMUNITY DEFENSE IN THIS CASE, AND ITS DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS.

The issue of qualified immunity for pre-1980 acts is extraordinarily narrow. The foster care provision at issue in that period is clear and creates distinct duties. Even assuming arguendo that the question presented in the petition can be said to encompass the foster care provisions presently in effect, it is still not a question warranting the exercise of the Court's discretionary review powers.

The defendants do not dispute that the lower courts applied the

appropriate factors from Harlow v. Fitzgerald, 457 U.S. 800 (1982). They also do not claim that there is a conflict with any decision of another Court of Appeals. They merely raise the issue of whether the Harlow criteria were correctly applied to the particular statutes involved in this interlocutory appeal.

A. Governmental officials are shielded from liability for damages only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. at 818. The Court of Appeals applied this test to the statutes at issue and held that Congress was quite specific and clear in the rights provided. Both the former foster care law and the present

"spell out a standard of conduct, and as a corollary rights in plaintiffs" which were clear to a reasonable person. Appendix to the Petition at 22a.

Section 408 of the Social Security Act, 42 U.S.C. §608, which was repealed and replaced in 1980, required, for each child in federally financed foster care and eligible for services under 42 U.S.C. §§602(a)(10) and 608(a), a plan "to assure that he receives proper care." Act of May 8, 1961, Pub.L. 87-31, § 2, 75 Stat. 76, repealed by the Adoption Assistance and Child Welfare Act of 1980, Pub.L. 96-272, Title I, § 101(a)(2), 94 Stat. 512 [hereinafter cited as "42 U. S. C. §608"]. See Miller v. Youakim, 440 U.S. 125, 138 (1979).

The program was enacted "with the overriding goal of providing the best

available care for all dependent children removed from their homes because they were neglected." Miller v. Youakim, 440 U.S. at 139. See S.Rep.No. 165, p.6; 107 Cong. Rec. 6388 (1961) (remarks of Sen. Byrd). Here, plaintiffs' damage claims arose because the children were not provided minimally adequate care and were subjected to abuse and neglect through defendants' actions and inactions.

"Concerned with assuring that States place neglected children in substitute homes determined appropriate for foster care", and with deterring "indiscriminate foster placements," Congress required that States establish licensing standards and supervise the foster homes. Miller, 440 U.S. at 140. Federal regulations governing the program further specified standard and

licensing requirements. Id.

Assuming that the pre-1980 acts are the only ones at issue in the petition, the duties in pre-1980 law were sufficiently clear to meet the Harlow test. Since 1980, the duties have been as clear and, in some respects, more precise. The defendants seem to concede this, both because they apparently do not raise post-1980 acts in their petition and because they themselves attempt to use the 1980 amendments' focus (and, presumably, clarity) to allege that pre-1980 law was inadequately clear. Petition at 16 n. 10.

The children agree that in the 1980 amendments creating a new Title IV-E of the Social Security Act, "the duty to assure 'proper care' was continued and amplified," as the Court of Appeals stated. Appendix to the Petition at

19a. This is not because the prior statutory mandate was seen as unclear. Rather Congress imposed additional requirements to ensure more effective implementation. 125 Cong. Rec. S15290-91 (daily ed. Oct. 29, 1979) (remarks of Sen. Cranston); 126 Cong. S6941 (daily ed. June 13, 1980) (statement of Sen. Cranston); Lynch v. King, 550 F. Supp. 325, 334, 341 (D.Mass. 1982), aff'd sub nom, Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

For example, in addition to a plan to assure proper care, 42 U.S.C. §§ 671(a)(16), 675(1) and (5), and 627(a)(2)(B), the state is required to establish and maintain standards for foster homes to ensure safety, 42 U.S.C. §671(a)(10), and, whenever it has reason to question the suitability of a foster home because of "neglect,

abuse, or exploitation" of a child, to "bring such condition to the attention of the appropriate court or law enforcement agency." 42 U.S. C. §671(a)(9).

In the lower courts, the officials never disputed that these and other provisions upon which the plaintiffs relied, created clear and specific duties. They made a Harlow argument as to the constitutional claims of the children, alleging that any rights under the fourteenth amendment to safe care while in state custody were not clearly established prior to 1980. As to the statutory claims, they only asserted that there was no private right of action to enforce them. In this Court, they do not suggest how the lower courts erred in concluding that

these duties created enforceable rights.^{2/}

B. The question raised by the defendants is one of remedies: whether the children can ever obtain damages under § 1983 for violations of federal foster care provisions. The inquiry required by Harlow, 457 U.S. 800, on the other hand, is directed at the status of the rights alleged to have been violated, not at the existence of

2/ Defendants try to show as examples of the lack of enforceable rights in federal law provisions of federal foster law which are not and never have been relied upon by the children. Petition at 17, n. 13. This argument as to 42 U.S.C. §§ 627(a)(2)(C) and (b)(3) has no relevance to the case. The children do not assert that each and every clause of the federal law creates an enforceable right.

remedies: "All [a court] need determine is ... whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions...." Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. at 2816.

In asking this Court to grant a writ of certiorari on the issue of §1983 as a remedy (discussed at greater length infra), the defendants are in effect asking this Court to review the lower courts' determination that the children stated a cause of action under §1983 for damages for violations of their statutory rights. That issue is not before this Court: "An appellate court reviewing the denial of the defendant's claim of immunity need not ... even determine whether the plaintiff's allegations actually state a claim." Mitchell, 472 U.S. 511,

105 S.Ct. at 2816.

Furthermore, an order denying a motion to dismiss for failure to state a cause of action is not a final judgment, and therefore is not appealable as of right under 28 U.S.C. §1291, and the lower courts have never determined that an appeal under 28 U.S.C. §1292(b) was appropriate. Allowing the workers to raise the cause of action issue turns the narrow Harlow exception to the final judgment rule into a broad avenue for appealing numerous interlocutory rulings. In any event, as discussed infra, the defendants knew or should have known of the remedies available under §1983.

The officials' §1983 argument distorts the purpose behind qualified immunity and adds another criterion for determining its applicability. Under

their approach, to be liable for damages, governmental officials must not only be aware that they are violating rights but also must be aware that there is an established remedy whereby they will be liable for damages for those violations. Otherwise, officials are free to engage knowingly in violations of foster children's constitutional and statutory rights without fear of liability. Such a reading of Harlow completely defeats this Court's efforts to balance carefully the goals of deterrence of abuse of office and protection of innocent officials. 457 U.S. at 814. Harlow elaborates a test of objective legal reasonableness which provides "no license to lawless conduct" and ensures protection of the "public interest in deterrence of unlawful conduct and in

compensation of victims." 457 U.S. at 819. An offender's lack of knowledge of the remedies available to victims of abuse of office is not a basis for immunity from liability.

C. There is no conflict in the Courts of Appeals or with decisions of this Court on the applicability of qualified immunity when officials are alleged to have violated the provisions of foster care law relied upon by the children: e.g., 42 U.S.C. §§608(f) (repealed), 627(a)(2)(B), 671(a)(9), 671(a)(10), and 671(a)(15). While this issue could conceivably prove to be a common or important one that eventually troubles or splits the circuits, there is no evidence to date that it will become such an issue, and the defendants' "floodgates" arguments (e.g., Petition at 7, 10) are quite exaggerated. This Court typically does

not grant certiorari in a case of first impression involving application of a particular statute, since repealed, based on pure speculation as to the future occurrence of similar litigation.

**II. THIS CASE PRESENTS NO UNRESOLVED
LEGAL ISSUE AS TO ENFORCEMENT OF
THE SOCIAL SECURITY ACT THROUGH
SECTION 1983**

While in some places in the Petition the defendants merely assert the very narrow proposition that the Harlow test was improperly applied below, elsewhere they assert the extraordinarily sweeping proposition that damages can never be obtained for violation of a statute enacted under the spending clause. This proposition does not appear in their Question Presented, is not one properly presented in an

interlocutory appeal, and contradicts the decisions of this Court. Even if this issue can be raised through this interlocutory appeal, the narrow decision below contains no broad holding justifying plenary review in this Court.

The defendants argue that the Court of Appeals' decision has broad ramifications for private enforcement of the Social Security Act. But no unresolved legal issue with regard to the Act was decided. This is not a case raising the issue of whether a court should imply a damage remedy in a statute previously not construed to contain a private cause of action for damages and other relief. The children sued under §1983. The Court below relied upon cases from this Court and another Court of Appeals in holding that particular provisions of the

Social Security Act are privately enforceable through §1983.

Section 1983 states in plain language that persons acting under state law or custom who deprive another of rights secured by federal laws "shall be liable in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983. "[T]he Section 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." Maine v. Thiboutot, 448 U.S. 1, 4 (1980). In Maine, this Court held that an action can be brought under §1983 to redress violations of Title IV of the Social Security Act, the same general title under which the foster children here sue. 448 U.S. at 3.

The decision in Maine cited a line of cases dating back to 1968 in which this Court consistently relied on the availability of a §1983 cause of action to enforce the Social Security Act. Indeed, this Court has relied upon the availability to foster children of a cause of action under §1983 to enforce 42 U.S.C. §608 itself. Miller v. Youakim, 440 U.S. 125 (1979); Maine v. Thiboutot, 448 U.S. at 5.

Although acknowledging that the "right to seek prospective equitable relief to enforce provisions of the Social Security Act..." is established in case law, Petition at 19, the defendants dispute whether the availability of damages under § 1983 for a Social Security Act claim has been clearly established. Yet, there is no precedent of this Court which would suggest that relief under § 1983

can be bifurcated -- that relief is available to redress violations of federal law through an injunction, but it cannot be used to obtain damages or restitution through an action at law or suit in equity. To the contrary, this Court has repeatedly held that damages are available under § 1983. Gomez v. Toledo, 446 U.S. 635, 638 (1980); Owen v. City of Independence, Missouri, 445 U.S. 622, 651 (1980); Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978).

Given that there are no modifiers to the clause "action at law, suit in equity or other proper proceeding..." in Section 1983, this Court's holding in Maine requires that those actions be available to enforce violations of the

laws.^{3/} 440 U.S. at 4. The officials do not argue that Congress intended, when enacting § 1983, to preclude damages and allow only injunctive relief to remedy violations of federal laws. See Maine, 448 U.S. at 6-7.^{4/} They suggest no other basis for their claim that damages are unavailable to redress violations of clear federal statutory mandates.

This Court has allowed monetary relief under §1983 to remedy violations of federal laws enacted

3/ There are, of course, other protections for some or all officials, such as eleventh amendment immunity, but the issue before the Court does not involve this immunity as the state defendants are sued in their personal capacities.

4/ The Court rejected the argument that Section 1983 was intended only for violations of civil rights laws. Maine, 448 U.S. at 7-8. In any event, the foster care provisions at issue were intended to safeguard the civil rights of foster children. See, e.g., 42 U.S.C. §671(a)(10).

pursuant to the spending clause of the Constitution. In fact, their availability caused this Court to explore the extent of protection afforded to the states by the eleventh amendment. Edelman v. Jordan, 415 U.S. 651 (1974). This term, in Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S.Ct. 766 (1987), the Court reaffirmed the availability of §1983 to obtain damages for violations of federal laws enacted pursuant to the spending clause. The officials attempt to distinguish Wright, on the basis that monetary relief took the form of equitable restitution rather than compensatory damages. However, for immunity purposes there is no relevant difference. See Edelman v. Jordan, 414 U.S. at 668.

Furthermore, in Maine, 448 U.S. 1,

the Court held that relief in the form of attorneys' fees is available against governmental officials for violations of the Social Security Act. 448 U.S. at 9. It would be anomalous if pecuniary relief in the form of attorney's fees were available for proving the underlying rights violation but pecuniary relief for the violation itself were not available.

Other courts have recognized — the availability of damages under §1983 for violations of the Social Security Act where there are no eleventh amendment barriers. E.g., Brown v. Porcher, 660 F.2d 1001, 1006-7 (4th Cir. 1983), cert. denied, 459 U.S. 1150 (1983) (damages available against state officers from "a special fund administered separate and apart from all ...funds of the State"); Vargas v.

Trainor, 508 F.2d 485 (7th Cir. 1974),
cert. denied, 420 U.S. 1008
(1975) (damages available when state
officers waive eleventh amendment
immunity).

The officials' reliance on
Guardians Ass'n v. Civil Service
Commission of the City of New York, 463
U.S. 582 (1983), is misplaced. In
Guardians Justice White, in a portion
of the decision in which only Justice
(now Chief Justice) Rehnquist
joined, suggested that the Court
should not imply a private right of
action for damages under Title VI of
the Civil Rights Act of 1964, 42 U.S.C.
2000d. Furthermore, Justice White
qualified even this suggestion by
stating that where the suit is against
state officials for intentional
deprivations of statutory rights, as is
the children's suit here, damages

may well be appropriate. Guardians, 463 U.S. at 597.

The officials' claim that this case raises an unresolved issue as to damages through §1983 for violation of a spending clause statute is thus simply wrong. The decision of the Court of Appeals followed a straightforward application of the factors set forth in Maine v. Thiboutot, 448 U.S. 1, Middlesex County Sewage Authority v. National Sea Clammers Assn, 453 U.S. 1, 19 (1983), and Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S. Ct. 766, for determining whether the range of relief under §1983 is available to enforce a federal statute.

One of those factors is whether there is evidence of congressional intent to limit enforcement mechanisms.

The officials cite no evidence, and could cite no evidence, of congressional intent in enacting the foster care provisions themselves to foreclose an action under §1983, in general, or more specifically an action for damages under §1983.

The other factor set out in Middlesex County Sewage Authority v. National Sea Clammers Ass'n, makes §1983 unavailable if the statute at issue does not create enforceable rights. 453 U.S. at 19. But, this Court has consistently recognized the existence of enforceable rights in beneficiaries of the Social Security Act, including the federal foster care program. Miller v. Youakim, 400 U.S. 125. See Rosado v. Wyman, 397 U.S. 397 (1970). The Court of Appeals carefully analyzed the enforceability of the rights created when it examined whether

these rights were clearly established for purposes of the Harlow test. Appendix to the Petition at 18a-22a.

This Court has held that the enforcement mechanisms provided in Title IV of the Social Security Act, in which the provisions at issue are located, were not intended to foreclose a private suit. Rosado v. Wyman, 397 U.S. 397 (1970). It also has relied upon the availability of a private suit to enforce § 608. Miller v. Youakim, 440 U.S. 125 (1979).

That Congress may have acted pursuant to the spending clause in passing the provisions at issue in Rosado, Miller, Maine v. Thiboutot, and this case hardly shows an intent to foreclose a damage remedy under § 1983 against individuals who, as the children allege, intentionally or with

deliberate indifference violate the rights of individuals protected by the enactment.

There may be an eleventh amendment barrier to a damage remedy against the state and its officials sued in their official capacity. Pennhurst State Hospital and School v. Halderman, 451 U.S. 1, 29 (1981).^{5/} However, there is no such barrier where state officials are sued for damages in their personal capacities and the other defendants, a city agency and its employees, are not protected by the amendment. Monell v. New York City Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

^{5/} Defendants' citation to Pennhurst in their petition seriously distorts the Court's holding in that case, which concerned the existence of statutory rights, not remedies. See Guardians Ass'n v. Civil Service Commission of New York, 463 U.S. at 636-637 (Stevens, J., dissenting).

Nor is there any conflict in the circuits on the availability of Section 1983 to enforce these provisions. The Court of Appeals for the First Circuit has held that § 1983 is available to enforce the federal foster care statutes. Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

The cases cited by the officials raise no conflict. In Lesher v. Lavrich, 784 F.2d 193, 197-198 (6th Cir. 1986), the court held that "relief nullifying a prior state court judgment of child neglect or dependency, or awarding damages in connection therewith, would not be available" in a suit for violation of 42 U.S.C. §627(b)(3), a form of relief and a statutory provision not at issue in this case. In Scrivner v. Andrews, 816 F.2d 261, 264 (6th Cir. 1987), the

court held that federal foster care law "does not create a right to 'meaningful visitation' enforceable under Section 1983," another type of claim unrelated to this case. In Harpole v. Arkansas Dept. of Human Services, 820 F.2d 923, 928 (8th Cir. 1987), the court found no rights under Title IV of the Social Security enforceable by a grandmother whose grandchild died due to the negligence of his mother.^{6/}

^{6/} Similarly, the district court decisions to which defendants point in their petition have no relevance here. They involve children in the custody of their parents and statutory provisions not at issue here. In Re Scott County Master Docket, 672 F.Supp. 1152, 1203-1205 (D. Minn. 1987) (suit raising enforceability of 42 U.S.C. §§627(a)(2)(c) and (b)(3) on behalf of children in parental custody); Jensen v. Conrad, 570 F.Supp. 91, 111-13 (D.S.C. 1983), aff'd. on other grounds, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (suit under 42 U.S.C. §620, et seq, alleging failure of governmental officials to protect children from their parents).

The officials' policy concerns that the availability of liability might discourage state participation in the federal foster care program, if valid, should be addressed to the Congress, not to this Court. Tower v. Glover, 467 U.S. 914, 922-923 (1984) (Court does not have "license to establish immunity from Section 1983 actions...").

III. THE DECISION OF THE COURT OF APPEALS IN THIS INTERLOCUTORY APPEAL IS A NARROW ONE WHICH LEAVES UNRESOLVED THE SCOPE OF EVEN THESE OFFICIALS' LIABILITY FOR VIOLATIONS OF FEDERAL FOSTER CARE PROVISIONS

There is no basis for the officials' claims that the Court of Appeals' decision has a "staggering impact on all state officials who administer federal grant programs." The decision is a narrow, interlocutory ruling limited to certain provisions of

foster care law. It makes no broad holdings on liability applicable to other programs.

In arguing that the decision exposes state officials to substantial risks in "numerous statutory schemes enacted in the spirit of cooperative federalism," the defendants minimize the protection afforded to state officials by the qualified immunity defense and by the decision in Middlesex County Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1983).

The decision in this case determines only that rights under four provisions of current foster care law and one repealed provision were clearly established. It does not address other provisions of federal foster care law, nor does it address other federal programs and whether they might create

enforceable rights for Harlow purposes. In addition, a claim under each program must be analyzed separately under the Middlesex criteria. The decision established no new rules for making the determination set out in Harlow, 457 U.S. 800, or the one in Middlesex, 453 U.S. 1.

The defendants also imply incorrectly that the protection afforded by the qualified immunity defense would have relieved all of them of any liability for damages. Even if the Court of Appeals had ruled that the statutory rights were not clearly established, not all of the defendants in this case would have been entitled to immunity. The qualified immunity defense has no relevance to the

Baltimore City Department of Social
Services.^{7/}

Similarly, it has not yet been determined whether the officials and employees of the Baltimore City agency are state or city officials and employees. If they are city officials, they are not entitled to assert a qualified immunity defense when sued in their official capacities, as they have been in this case. Brandon v. Holt, 469 U.S. 464, 472 (1985). In this

7/ That department has claimed to be a state agency for the purposes of this case, and if it is correct, it is protected by the eleventh amendment from an award of damages and qualified immunity is irrelevant. However, the district court has not yet determined this issue. If the children are correct and it is a city agency, it is not entitled to assert the qualified immunity defense. Owen v. City of Independence, Missouri, 445 U.S. 622, 630 (1980).

circumstance, even if given qualified immunity in their personal capacities, they would still have to stand trial in their official capacities.

Furthermore, the officials and agency have not shown that they were "performing discretionary functions," Harlow, 457 U.S. at 818, in any of the acts or omissions that the children allege violated their rights, a wide range of illegal actions and inactions, including: placing and maintaining them in unsafe, harmful foster homes; denying them necessary medical care; and leaving them in unsafe placements after the defendants learned of the risks to the children of remaining in the foster homes.

CONCLUSION

For all of the foregoing reasons, respondents respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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June 1, 1988

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(4)
No. 87-1796

Supreme Court, U.S.

FILED

JUN 1 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L. J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for The Fourth Circuit

APPENDIX TO BRIEF FOR RESPONDENTS IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Through His Next *
Friend, Lydia Kaye *
Darr *

and *

O.S., *
An Infant, By And *
Through Her Next *
Friend, Jackie *
Garner *

and *

M.S., *
An Infant, By And *
Through Her Next *
Friend, Susan *
Leviton *

and *

C.S., *
An Infant, By And *
Through Her Next *
Friend, Susan *
Leviton *

and *

R.R. *

and *

Civil Action No.:

REQUEST FOR JURY
TRIAL

P.G., *
An Infant, By And *
Through Her Next *
Friend, Margaret *
Evans, On Their *
Own Behalf And On *
Behalf Of All *
Others Similary *
Situating *

Plaintiffs *

-vs- *

RUTH MASSINGA, *
Individually And *
As Secretary Of *
The Maryland *
Department of *
Human Resources, *

and *

FRANK FARROW, *
Individually And *
As Executive Direc- *
tor Of the *
Maryland Social *
Services Admini- *
stration, *

and *

JOY DUVA, *
Individually And *
As Director Of *
The Office of *
Child Welfare *
Services, Maryland *
Social Services *
Administration, *

and *

BUD NOCAR *

Individually And *
As Acting Program *
Manager For Foster *
Care Services Of *
The Maryland Social *
Services Admini- *
stration, *

and *

ALMA RANDALL, *

Individually And *
As Program Manager *
For 24-Hour Group *
Care And Licensing *
Of The Maryland *
Social Services *
Administration, *

and *

BALTIMORE CITY DE- *
PARTMENT OF SOCIAL *
SERVICES, *

and *

GEORGE MUSGROVE, *

Individually And *
As Director Of The *
Baltimore City *
Department of *
Social Services, *

and *

MICHAEL WARNER- *
BURKE, *
Individually And *
As Chief Of Protec- *
tive Services For *
The Baltimore City *
Department of *
Social Services, *

and *

CHERYL GIBSON, *
Individually And *
As Caseworker For *
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and *

BRIDGETTE THOMAS *
Individually And *
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Department of *
Social Services, *

and *

MARYLYN HOLCOMBE, *
Individually, And *
As Caseworker For *
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Department of *
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and *

DELORES COOPER, *
Individually And *
As Caseworker For *
The Baltimore City *
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and *

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and *

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Department of *
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and *

JOHN ROES 1 Through *
12, *
Individually And
As Caseworker For *
The Baltimore City
Department of *
Social Services, *

Defendants *

 * * * * * * *

COMPLAINT

I. INTRODUCTION

1. This class action is brought by children in Maryland who have been or will be placed in foster homes approved by and under the direct control and supervision of the Baltimore City Department of Social Services. While in these homes, the children have been or

are at risk of being abused or neglected, subjected to grossly inadequate care and denied an opportunity for a permanent home. These injuries have resulted from the failure of the state and city officials to meet the minimum requirements for an adequate foster care program established by federal law.

2. The foster care program in Maryland is created and governed by federal and state statutes and regulations. It is financed by federal appropriations made available to the states under the provisions and conditions of the Social Security Act, 42 U.S.C. §§601, et seq., as matching payments for state funds. As a condition of receiving such funds, Defendants must comply with federal statutes and regulations. The Baltimore City

Department of Social Services, its agents and employees ("city defendants") are responsible for the day-to-day operation of the foster care program in Baltimore City. The Maryland Social Services Administration, its agents and employees ("the state defendants") are responsible for and have authority to supervise, direct, and control the city defendants' foster care program.

3. The foster care program is designed to provide, among other things, short-term care and supportive and rehabilitative services for a child who must be placed outside the home of his parents or legal guardian because the child's physical or emotional well being is jeopardized by conditions in that home. In addition, services are to be provided to both parent and child to

facilitate the child's return home or to implement an alternative permanent plan, such as adoption.

4. Each member of the Plaintiff class has been placed in foster care either as a result of an agreement between their parents or legal guardian and the local Department of Social Services or pursuant to an order of the Circuit Court finding the child to have been abused or neglected and committing the child to the care and custody of the local Department of Social Services. Once Plaintiffs have been placed in the custody of the local Department of Social Services, that Department is responsible for and has the authority to select the type of and specific foster care placement for each Plaintiff. Foster care sometimes consists of

placement in a group home or institution, but in most cases results in placement in a foster family home.

5. The failure of state and city officials responsible for the foster care program to fulfill their responsibility under federal law and their deliberate indifference to the care and safety of foster children has caused, and will cause, injury to the Plaintiffs and the members of their class. Plaintiffs have been subjected to and are at risk of suffering further abuse and neglect in the foster homes inadequately screened, approved, and supervised by the Baltimore City Department of Social Services. While residing in these homes, they have been, and will continue to be, denied services to meet both their physical and emotional needs.

Furthermore, the Defendants' failure to provide case plans, case reviews, and other services to Plaintiffs and members of their class has deprived and will continue to deprive them of an opportunity for return to their home or other permanent placement.

6. Plaintiffs assert that the Defendants' practices have violated their rights under the Fourteenth Amendment to the United States Constitution; the Social Security Act, 42 U.S.C. §§601, et seq. and the federal regulations promulgated pursuant to that Act, 45 C.F.R. §§1355, et seq.; and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§5101, et seq. and the federal regulations promulgated pursuant to that Act, 45 C.F.R. §§1340, et seq.

7. Plaintiffs on behalf of themselves and on behalf of the class, seek declaratory and injunctive relief to enforce their rights under the United States Constitution, federal statutes and regulations. The individual Plaintiffs seek actual compensatory and punitive damages for physical and psychological harms suffered while in the foster homes as a proximate result of the acts and omissions of the Defendants. Neither compensatory nor punitive damages are sought herein for any of the unnamed class members. In bringing this action on their behalf for equitable relief, the named Plaintiffs do not waive the right of the unnamed class members to seek such damages.

II. JURISDICTION

3

8. This action arises under 42 U.S.C. §§1983 and is brought to redress the deprivation under color of state law, of rights, privileges and immunities secured by the Fourteenth Amendment to the United States Constitution and by Acts of Congress.

9. Jurisdiction is conferred on this Court by 28 U.S.C. §§1343 (a)(3) and (4).

10. Jurisdiction is also conferred on this Court by 28 U.S.C. §1331 which provides for jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States.

11. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201 and 2202 which provide for this Court's authority to declare the rights of any interested

party and to grant necessary or proper relief on the declaratory judgment in a case of actual controversy within its jurisdiction.

III. PARTIES

A. PLAINTIFFS

12. L.J. is ten years old, his date of birth being August 7, 1974. He brings this action by and through his next friend, Lydia Kaye Darr. They are both United States citizens and residents of Maryland. L.J. has been a foster child under the care and custody of the Baltimore City Department of Social Services since July, 1977.

13. O.S. is one year old, her date of birth being September 9, 1983. She brings this action by and through her next friend, Jacki Garner. They are

both United States citizens and residents of Maryland. O.S. has been a foster child under the care and custody of the Baltimore City Department of Social Services since January 6, 1984.

14. M.S. is 12 years old, her date of birth being May 26, 1972. She brings this action by and through her next friend, Susan Leviton. They are both United States citizens and residents of Maryland. M.S. has been a foster child under the care and custody of the Baltimore City Department of Social Services since April, 1983.

15. C.S. is six years old, her date of birth being February 21, 1978. She is the sister of Plaintiff M.S. and she brings this action by and through her next friend, Susan Leviton. They are both United States citizens and

residents of Maryland. C.S. has been a foster child under the care and custody of the Baltimore City Department of Social Services since April, 1983.

16. R.R. is 18 years old, her date of birth being June 14, 1966. She is a citizen of the United States and a resident of Maryland. R.R. has been a foster child under the care and custody of the Baltimore City Department of Social Services since February, 1983.

17. P.G. is 17 years old, her date of birth being July 3, 1967. She brings this action by and through her mother, Margaret Evans, as next friend. They are both United States citizens and residents of Maryland. P.G. has been a foster child under the care and custody of the Baltimore City Department of Social Services since July 14, 1967.

B. DEFENDANTS

18. Ruth Massinga is sued individually and in her official capacity as Secretary of the Department of Human Resources for Maryland. In that capacity she is responsible for the operation of the State Department of Human Resources, which includes the Social Services Administration and its programs of foster care and child welfare services.

19. Frank Farrow is sued individually and in his official capacity as Executive Director of the Maryland Social Services Administration. In that capacity he is responsible for the administration of the Social Services Administration and for the supervision of the local Departments of Social Services throughout Maryland, including

the Baltimore City Department of Social Services. The Maryland Social Services Administration is an agency of the State of Maryland. It is the central coordinating and directing agency for the child welfare services, including foster care services, and exercises supervision over all public and private institutions having the care, custody and control of dependent, neglected and abandoned children. It has the power to inspect the management of any agency engaged in social services or welfare activities. It is authorized and empowered to adopt and has adopted rules and regulations governing the standards for and licensing of child placement agencies and foster family homes in Maryland. It is the state agency in Maryland which administers and supervises the

administration of programs under Title IV of the Social Security Act, 42 U.S.C. §§601, et seq., and under the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§5101, et seq.

20. Joy Duva is sued individually and in her official capacity as the Director of the Office of Child Welfare Services of the Maryland Social Services Administration. In that capacity she is responsible for the supervision of all child welfare programs, including the licensing of foster care and child placement agencies which is the direct responsibility of the local Departments of Social Services.

21. Bud Nocar is sued individually and in his official capacity as Acting Program Manager for Foster Care Services within the Maryland Social Services

Administration. In that capacity he is responsible for the definition, development, implementation, monitoring, and evaluation of the foster care programs established and maintained by the local Departments of Social Services, including the Baltimore City Department of Social Services.

22. Alma Randall is sued individually and in her official capacity as Program Manager for 24-hour group care and licensing of the Maryland Social Services Administration. In that capacity she is responsible for implementing state law and regulations concerning the licensing of group facilities and child placement agencies in Maryland and monitoring and evaluation their compliance with state law and regulation.

23. Defendants Massinga, Farrow, Duva, Nocar, and Randall are hereinafter referred to as the "state defendants."

24. The Baltimore City Department of Social Services is an agency of the City of Baltimore and the State of Maryland and has legal and physical custody of the Plaintiffs and members of their class. The Baltimore City Department of Social Services is responsible for recruiting, screening, approving, monitoring, and supervising foster homes and providing services to Plaintiffs while in foster care.

25. George Musgrove is sued individually and in his official capacity as Director of the Baltimore City Department of Social Services. In that capacity he is responsible for the administration and supervision of all

social service and public assistance activities carried on by the Baltimore City Department of Social Services, including its foster care, child welfare services, and protective services programs.

26. Michael Warner-Burke is sued individually and in his official capacity as Chief of the Protective Services Division for the Baltimore City Department of Social Services. He was formerly, and at all times relevant to this complaint until on or about June 11, 1984, the Chief of Foster Care Services for the Baltimore City Department of Social Services. In his present capacity, he is responsible for the administration and supervision of the Protective Services Division of the Baltimore City Department of Social Services and

for directing, training, and controlling all subordinates, social workers, and caseworkers in that division. The Protective Services Division is responsible for investigating reports of suspected abuse and neglect involving Plaintiffs and members of their class and taking prompt action to protect them from further maltreatment.

27. Defendants Gibson, Thomas, Holcombe, Fulton, DeWatkins, Simmons, Baird, Collins, Suravin, Graves, and John Roes 1 through 12 are sued individually and in their official capacities as caseworkers. Caseworkers for the Baltimore City Department of Social Services are responsible for implementing the rules, regulations, policies, and decisions of the Maryland Social Services Administration and the

Baltimore City Department of Social Services affecting foster children within the care and custody of the Baltimore City Department of Social Services. They are responsible for the placement and supervision of foster children who are in the care and custody of that Department and who are placed in shelter care and foster homes.

28. Defendant Cheryl Gibson was the caseworker assigned to Plaintiff L.J.'s case from approximately August, 1981 until November, 1983.

29. Defendant Bridgette Thomas was the caseworker assigned to Plaintiff L.J.'s case from approximately December, 1978 until June, 1981.

30. Defendant Marilyn Holcombe was the caseworker assigned to Plaintiff

L.J.'s case from approximately June, 1977 until November, 1977.

31. Delores Cooper is sued individually and in her official capacity as Caseworker Supervisor for the Baltimore City Department of Social Services. As a Caseworker Supervisor, Defendant Cooper was responsible for directing and controlling all subordinates, social workers, and caseworkers in her department. At all times relevant hereto, Defendant Cooper supervised Defendants Holcombe, Thomas, and Gibson while they were assigned to Plaintiff L.J.'s case from approximately June, 1977 until November, 1983. Defendant Cooper was directly responsible, along with Defendants Holcombe, Thomas, and Gibson, for formulating Plaintiff L.J.'s case plan and for making final decisions

concerning Plaintiff L.J.'s treatment and placement.

32. At all times relevant hereto, Defendant Gail Fulton was one of the caseworkers assigned to Plaintiff O.S.'s case.

33. At all times relevant hereto, Defendant Elvia DeWatkins was one of the caseworkers assigned to Plaintiff O.S.'s case.

34. Dawn Zinkand is sued individually and in her official capacity as Caseworker Supervisor for the Baltimore City Department of Social Services. As a Caseworker Supervisor, Defendant Zinkand was responsible for directing and controlling all subordinates, social workers, and caseworkers in her department. At all times relevant hereto, Defendant Zinkand supervised Defendants

-Gail Fulton and Elvia DeWatkins. Defendant Zinkand was directly responsible, along with Defendants Fulton and DeWatkins, for formulating Plaintiff O.S.'s case plan for making final decisions concerning Plaintiff O.S.'s treatment and placement.

35. At all times relevant hereto, Defendant Jerilyn Simmons was one of the caseworkers assigned to the cases of Plaintiffs M.S. and C.S.

36. At all times relevant hereto, Defendant Anthony Baird was one of the caseworkers assigned to the cases of Plaintiffs M.S. and C.S.

37. Susan Lieman is sued individually and in her official capacity as Caseworker Supervisor for the Baltimore City Department of Social Services. As a Caseworker Supervisor, Defendant

Lieman was responsible for directing and controlling all subordinates, social workers, and caseworkers in her department. At all times relevant hereto, Defendant Lieman supervised Defendants Simmons and Baird. Defendant Lieman was directly responsible, along with Defendants Simmons and Baird, for formulating Plaintiffs M.S. and C.S.'s case plan for making final decisions concerning Plaintiffs M.S. and C.S.'s treatment and placement.

38. At all times relevant hereto, Defendant Allen Collins was one of the caseworkers assigned to Plaintiff R.R.'s case.

39. At all times relevant hereto, Defendant Susan Zuravin was one of the caseworkers assigned to Plaintiff P.G.'s case.

40. At all times relevant hereto, Defendant Emma Graves was one of the caseworkers assigned to Plaintiff P.G.'s case.

41. John Roes 1 through 12 are sued individually and in their official capacity as caseworkers or supervisors for the Baltimore City Department of Social Services. Plaintiffs do not know the true names of of the Defendants sued herein as John Roes 1 through 12 and therefore sue these Defendants by fictitious names and will amend the complaint to show their true names when they are ascertained. Plaintiffs are informed and believe that these Defendants named as John Roes 1 through 12 are agents and employees of the Baltimore City Department of Social Services and that they conducted the

investigations and approved the foster homes in which the named Plaintiffs L.J., O.S., M.S., C.S., R.R., and P.G. were placed.

42. Defendants, Baltimore City Department of Social Services, Musgrove, WarnerBurke, Gibson, Thomas, Holcombe, Cooper, Fulton, DeWatkins, Zinkand, Simmons, Baird, Lieman, Collins, Zuravin, Graves and John Roes 1 through 12 are hereinafter referred to as the "city defendants."

IV. CLASS ACTION ALLEGATIONS

43. Plaintiffs L.J., O.S., M.S., C.S., R.R., and P.G. bring this action on behalf of themselves and pursuant to Fed. R. Civ. P. 23(b)(2) on behalf of all other persons similarly situated. The members of this class are all those

children who are, have been, or will be placed in foster homes by the Baltimore City Department of Social Services and are or will be placed in the custody of the Baltimore City Department of Social Services pursuant to:

(1) An authorization or order of emergency shelter care granted to the Baltimore City Department of Social Services by an intake officer or by the Circuit Court for Baltimore City, Division for Juvenile Causes, under the provisions of Md. Cts. & Jud. Proc. Code Ann. §3-815, or

(2) An order of commitment, care, or custody granted to the Baltimore City Department of Social Services by the Circuit Court for Baltimore City, Division for Juvenile Causes, under Md. Ct. & Jud. Proc. Code Ann. §3-820, or

(3) An order of guardianship with the right to consent to adoption or long-term care short of adoption granted to the Baltimore City Department of Social Services by the Circuit Court for Baltimore City under Md. Fam. Law Code Ann. §§5-301, et seq., or

(4) A voluntary foster care agreement between their natural parents or legal guardians and the Baltimore City Department of Social Services.

44. The class is so numerous that joinder of all members is impractical in that there are over two thousand five hundred (2,500) children currently in foster care in Baltimore City and approximately five hundred (500) new children are placed in shelter or foster care homes each year as a result of commitments to the Baltimore City

Department of Social Services by the Circuit Court.

45. There are questions of law and fact common to the class in that:

- a. All members of the class are or will be in the custody of the Baltimore City Department of Social Services.
- b. All members of the class seek to vindicate rights, privileges, and immunities which have been violated by the Defendants and which are secured by the Fourteenth Amendment to the United States Constitution, provisions of the Social Security Act, 42 U.S.C. §§601, et seq., and provisions of the Child Abuse Prevention and Treatment Act

of 1974, U.S.C. §§5101, et
seq.

- c. All members of the class challenge similar conditions of their foster homes and inadequacies in foster care services provided by the Baltimore City Department of Social Services.

46. The claims of the named Plaintiffs are typical of the claims of the class in that the same acts and omissions of Defendants form the basis for the claims of all members of the class.

47. The named Plaintiffs will fairly and adequately represent and protect the rights and interests of the class.

48. Defendants have acted and failed to act and continue to do so on the grounds which are generally applicable to the class, thereby making final declaratory and injunctive relief appropriate with respect to the class as a whole.

V. STATUTORY AND REGULATORY FRAME-
WORK OF THE FOSTER CARE PROGRAM

49. The State of Maryland participates in, and receives federal funds for, programs created by three inter-related subtitles of the Social Security Act: Title IV-A, (Aid to Families with Dependent Children, or "AFDCⁿ"), 42 U.S.C. §§601-615; Title IV-B (Child Welfare Services), 42 U.S.C. §§620-628; and Title IV-E (Foster Care and Adoption Assistance), 42 U.S.C. §§670-676.

50. As a condition of the receipt of federal funds for the basic AFDC program under Title IV-A, Maryland must have in effect a state plan for foster care and adoption assistance under Title IV-E. The state is required to operate its foster care and adoption assistance program in accordance with all the conditions set forth in Title IV-E of the Act. 42 U.S.C. §602(a)(20).

51. The foster care program created by Title IV-E must be in effect statewide; it is mandatory upon local agencies that administer the programs; and it must be coordinated with the programs at the state or local level assisted under Titles IV-A and IV-B. 42 U.S.C. §671(a)(3) and (4); 45 C.F.R. §§1356.10, et seq.

52. The federal funds provided to Maryland under the Title IV-E foster care program are used to cover the costs of food, clothing, shelter, daily supervision, school supplies, and personal items for foster children. Each child is entitled to have foster care maintenance payments made on his or her behalf while in a foster family home, 42 U.S.C. §671(a)(1), and each such home must be "licensed by the state . . . or . . . approved . . . as meeting the standards established for such licensing." The state is reimbursed at a rate of approximately 50% for the above expenses. Federal funds are also used to cover 75% of the costs of training caseworkers and others responsible for foster care services. Federal financial participation at the rate of 50% is

available for administrative expenses associated with the operation of the state's foster care program, including such times as recruitment and licensing of foster homes, placement of the child, development of the case plan, case reviews, and case management and supervision. 42 U.S.C. §674, 45 C.F.R. §1356.60.

53. In addition to the receipt of federal funds under Titles IV-A and IV-E, Maryland has at all times relevant to this complaint received federal funds under Title IV-B (Child Welfare Services). Funds received under Title IV-B of the the Social Security Act have been, and are, used to cover the costs of caseworker salaries, counseling or treatment for foster children, administrative expenses, and other services of

the local Departments of Social Services necessary for assuring adequate care of children placed in foster care. 42 U.S.C. §625(a)(1), 45 C.F.R. §1357.10.

54. Beginning with federal fiscal year 1981 (October 1, 1980 through September 30, 1981), states have been, and are, eligible for supplemental funds under Title IV-B if they provide, inter alia, a case review system, as explicitly defined in the federal law, for each child in foster care under the supervision of the state. 42 U.S.C. §627; 45 C.F.R. §1357.25.

55. Since October 1, 1980, Maryland has received the supplemental Title IV-B funds, thus making certain requirements of case review, case plans, and proper care and services applicable to children in the foster care program

operated by the Defendants. 42 U.S.C. §627.

56. The State of Maryland also has elected to participate in, and does receive funds under, the Child Abuse Prevention and Treatment Act. 42 U.S.C. §§5101, et seq.

57. As a condition for receipt of federal funds under Title IV-E, Maryland is required to establish, maintain, apply, and periodically review standards of, inter alia, safety, sanitation, and civil rights for foster children in foster family homes receiving funds under either Title IV-B or Title IV-E. In particular, the defendants must:

(10). . . be responsible for establishing and maintaining standards for foster family homes and child welfare institutions which are reasonably in accord with recommended standards of

national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provide[] that standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter.

(11) provide[] for periodic review of the standards referred to in the preceding paragraph . . . to assure their continuing appropriateness.

42 U.S.C. §671(a)(10) and (11).

58. Because they receive funds under Title IV-E and Supplemental IV-B funding, Defendants are required to develop a case plan and case review system that maintains, inter alia, appropriate foster care placements, assures proper care and services for the

child, and meets the best interests and special needs of the child. 42 U.S.C. §§627(a)(2)*(B), 671(a)(16), 675(1), 675(5); 45 C.F.R. §§1356.21, 1357.25. A case plan is defined by 42 U.S.C. §675(1) as:

a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into a judicial determination made with respect to the child in accordance with section 672(a) (1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or

the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

42 U.S.C. §675(5) defines a case review system as a system in which, inter alia,

(A) each child has a case plan designed to achieve placement in the least restrictive (most family-like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child.

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or administrative review . . . in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress . . . made toward alleviating the

causes necessitating
placement. . .

59. As a further condition for receipt of funds under Title IV-E and Supplemental IV-B funding, Defendants are required to ensure that each child's case plan provides "that services are provided to the parents, child and foster parents in order to improve the conditions in the parents' home or facilitate return of the child to his own home or the permanent placement of the child . . ." 42 U.S.C. §§627(a)(2) (B), (C), 671(1)(16), and 675(1). Defendants must also make "in each case, reasonable efforts to make it possible for the [foster] child to return to his home." 42 U.S.C. §671(a)(15); 45 C.F.R. §1356.21.

60. Among the standards for foster homes and foster parents that the state defendants have established and purport to maintain through the city defendants in order to comply with the Social Security Act requirements are the following:

- a. Foster parents selected by the agency must be capable of providing good parenting and foster homes approved by the agency must meet certain requirements for foster family homes;
- b. Foster parents and members of their families must be in good mental and physical health;
- c. Foster parents must have knowledge, interest in, and

practice principles of good child care;

- d. Foster parents must have the maturity and personality characteristics such that they provide an emotional climate in which the child can grow and mature and have the maximum opportunity for healthy personality development;
- e. The age and strength of foster parents must be such that they can meet the needs of the foster children placed with them;
- f. Foster parents must support and encourage children to attend school regularly, to make progress therein, and

provide the children with adequate clothing and other supplies necessary for their participation in all school programs;

- g. The foster home must meet the public health and sanitary requirements of the local health department;
- h. The foster home must have accessible space for outdoor activity, free from conditions dangerous to the health and safety of children;
- i. The foster home must provide each child with sleeping space and privacy and his own individual bed;
- j. The foster home must be adequately furnished and

provide children with items essential to basic health and comfort, including but not limited to adequate bedding, linens, and other personal essentials.

61. In order to fulfill the state's obligations under federal statutes to maintain standards for foster family homes, to provide proper care and services to foster children, and to achieve reunification or other alternate permanent placement for foster children, the state defendants have established requirements that the city defendants must among other things:

- a. Maintain staff sufficient in number and qualification for the agency to carry out its foster care responsibilities;

- b. Assure that staff are qualified for their assignments and that they are regularly and consistently supervised by staff with professional training in social work and with experience in social work practices;
- c. Provide continued training and development of all staff members and other additional help to enable staff to develop professional competence;
- d. Maintain proper medical and casework records;
- e. Select and maintain foster homes in sufficient number and variety to provide for the

types of children for whom the agency is responsible;

- f. Recognize when a child needs psychological and psychiatric service and assure that the child receives whatever service he needs;
- g. Assure that children in its care receive physical and dental examinations at least annually and that the medical and dental examinations at least annually and that the medical and dental care recommendations are followed;
- h. Closely supervise and regularly re-evaluate the child's growth and development in the foster home. Re-evaluations must be conducted by the local

Department of Social Services
90 days after the child's
initial placement, 180 days
after placement, and at least
once every six months there-
after, or more frequently if
there is a substantial change
in the child's circumstances;

- i. Provide supportive caseworker
and other rehabilitative
services to the child who is
in foster care;
- j. Upon receiving a report of
suspected child abuse, make a
thorough and prompt investi-
gation of that report, includ-
ing an on-site investigation
within twenty-four (24) hours
during which the Department,
its agents, and employees must

see the child, attempt to have an on-site interview with the child's caretaker, and decide on the health, safety, and well-being of the child;

- k. Upon receiving a report of suspected child neglect, make a thorough and prompt investigation of that report, including an on-site investigation within five (5) days during which the Department, its agents, and employees must see the child, attempt to have an on-site interview with the child's caretaker, and decide on the health, safety, and well-being of the child.

62. As a further condition for receipt of federal funds under Title

IV-E, Defendants are required to provide that:

where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency.

42 U.S.C. §671(a)(9).

63. As a condition for receiving federal funds under the Child Abuse Prevention and Treatment Act and as a further condition for receiving funds under Titles IV-B and IV-E, the state and city defendants must ensure that investigations of reports of suspected abuse and neglect are promptly initiated

and that upon a finding of abuse or neglect immediate steps are taken to protect the health and welfare of the abused or neglected child. 42 U.S.C. §5103(b)(2)(c).

64. As a further condition for receiving federal funds under the Child Abuse Prevention and Treatment Act, the state and city defendants, upon receipt of a report of abuse or neglect in a foster home approved by and under the supervision of the local Department of Social Services, must ensure that the investigation is made by some properly constituted authority other than the local Department of Social Services or the Social Services Administration. 45 C.F.R. §1340.14(3).

VI. STATEMENT OF FACTS

A. INDIVIDUAL PLAINTIFFS

L.J.

65. On or about June 1, 1977, L.J., then two years old, was placed in the home of Pinkie B. pursuant to a voluntary agreement between his mother and the Baltimore City Department of Social Services. He remained in that foster home for more than six years until he was removed as a result of the first review of his case conducted by the Circuit Court for Baltimore City, Division for Juvenile Causes.

66. On or about July 14, 1977, Defendants Holcombe and Cooper requested that a foster home study for the home of Pinkie B. be conducted by Defendants John Roes 1 and 2.

67. Defendants John Roes 1 and 2 investigated and approved the home of Pinkie B. as a foster home for L.J.

68. In August, 1977, the Baltimore City Department of Social Services initiated the payment of foster care benefits to the foster mother on behalf of and for the benefit of L.J.

69. L.J.'s foster mother was not capable of providing safe and proper care for L.J. which Defendants Warner-Burke, Gibson, Thomas, Holcombe, Cooper, and John Roes 1 and 2 knew or should have known if, prior to approving the home, these Defendants had adequately investigated it, or, if after initially approving it, they had properly supervised L.J.'s foster home.

70. L.J.'s foster mother was and is an alcoholic who has been treated for alcoholism and alcoholism-related problems on more than 41 separate occasions as both an in-patient and out-patient.

While L.J. was placed in her home, she was taken to Johns Hopkins Hospital on many occasions with blood alcohol levels in the toxic range.

71. L.J.'s foster mother has a history of serious mental illness including several suicide attempts.

72. L.J.'s foster mother has been involved in many violent altercations in her home and in the presence of L.J. Several of these fights have resulted in stab wounds and other serious injuries to the foster mother, requiring medical treatment.

73. L.J.'s foster mother frequently left L.J. in the care of person who were incapable of providing proper care and supervision for L.J.

74. The home environment of the foster mother was chaotic, with as many

as eight children and adults living in the home and L.J. forced to share a bedroom and a bed with an 85 year-old disabled man.

75. Throughout L.J's placement in the home, he was subjected to physical and emotional abuse both by the foster mother and by other persons to whom she entrusted his care. The physical injuries which L.J. suffered as a result of that abuse have left permanent scars affecting virtually every part of his body including the legs, face, arms, chest, abdominal area, back and buttocks.

76. The foster care review hearing which finally resulted in L.J. removal from the abusive and neglectful foster home in which the Baltimore City Department of Social Services had placed him

six years earlier was initiated by the foster care review process of the juvenile court and was not the result of a request or any other action by any of the state or city defendants.

77. For more than six years, while in foster care, L.J. did not have a case plan nor were any case reviews conducted on his behalf by either the state or city defendants.

78. L.J.'s case was unassigned and no supervision of his foster home was provided for substantial periods of time including most of 1978.

79. The failure to provide supervision of L.J.'s foster home was due, in part, to the excessive caseloads of workers in the Baltimore City Department of Social Services.

80. From November 1, 1977 through May, 1980, Defendants Thomas and Cooper made only five visits to L.J.'s foster home.

81. Even a cursory evaluation of the foster mother and the foster home environment would have led to the discovery that L.J.'s foster home was not appropriate and would have resulted in his removal from the home.

82. During the 1979 to 1980 school year, L.J.'s first year in school, L.J. missed 55 days out of the 180-day school year. During that school year his performance was extremely poor in that he had a short attention span, was easily distracted, appeared withdrawn, and could not follow simple directions.

83. Defendant Bridgette Thomas knew that L.J. had been absent for

almost onethird of his first school year while living in the foster home.

84. In April, 1980, L.J. was referred by school personnel for a screening to determine an appropriate special educational program for him. As a result of that screening, L.J. was retained in kindergarten and further evaluations were scheduled.

85. In December, 1980, a psychological evaluation of L.J. was conducted by a psychologist for the Baltimore City Public Schools.

86. The school psychologist made the following observations in her evaluation of L.J. in December, 1980:

- a. That L.J. had not developed social behaviors commensurate with his age;

- b. That L.J. stated that he didn't like the foster home and wanted to live elsewhere;
- c. That L.J. engaged in many self destructive behaviors, including sticking tacks in his hands;
- d. That L.J. needed constant close supervision while in the classroom;
- e. That L.J. was an extremely anxious and a depressed child and had a very poor selfimage.

87. As a result of her evaluation of L.J., the school psychologist concluded:

- a. That L.J. was functioning at the mildly intellectually limited level of intelligence

but had the potential for higher functioning;

b. That the depression and anxiety that L.J. was experiencing were caused by the home environment of the foster mother;

c. That L.J.'s emotional problems were the primary factor interfering with his learning.

88. The school psychologist recommended that L.J. be immediately removed from the home in which the Baltimore City Department of Social Services had placed him. She also recommended that L.J. be provided with individual counseling to resolve the emotional problems which were interfering with his learning and that the Baltimore City Department of Social

Services obtain a thorough physical and mental examination of L.J.

89. The school psychologist discussed her observations, conclusions, and recommendations during several telephone conversations with, and school conference attended by, Defendants Thomas and Cooper during the months of October, November, and December, 1980. The psychologist's written reports which contained her recommendations for L.J. were readily available to Defendants Thomas and Cooper.

90. Despite Defendants Thomas and Cooper's actual knowledge of the school psychologist's recommendations that L.J. should be immediately removed from the foster home and that he was in need of individual counseling and further examination, Defendants Thomas and

Cooper neither removed him from the foster home nor obtained the recommended services for him.

91. During the next several months following the school psychologist's recommendations, L.J.'s performance and behavior in school continued to deteriorate. He repeatedly talked about running away and killing himself; he referred to himself as "stupid" and "ugly"; and he became physically and verbally abusive to his peers and teachers.

92. In September, 1981, L.J. was transferred to a school for emotionally disturbed children.

93. During the 1981-82 and the 1982-83 school years, L.J.'s behavior and achievement in school worsened as the same serious problems in the foster

home that had existed in earlier years continued unabated.

94. Throughout L.J.'s school placement beginning in the school years 1979 to 1980 and continuing through the school year 1982-1983, L.J.'s foster mother was asked to attend school conferences to which the school personnel discussed L.J.'s progress, behavior, treatment, and alternative placements.

95. L.J.'s foster mother failed to attend any of the school conferences scheduled during those school years. Defendants Cooper, Gibson, and Thomas knew that the foster mother was not attending school conferences for L.J.

96. During the school year 1979-80 and continuing through the school year 1982-83, Defendants Cooper, Gibson, and

Thomas were invited to attend or were aware of school conferences conducted to discuss L.J.'s failure to make progress in school. These Defendants did not attend most of the school conferences after December, 1980, but relied upon the foster mother's statements that L.J. was adjusting well and that his performance in school was good.

97. L.J.'s foster mother failed to provide L.J. with the support and encouragement that he needed and that would have enabled him to make progress in school.

98. On July 29, 1981, medical and social work staff at Johns Hopkins Hospital submitted a report of suspected child abuse for L.J. to the Baltimore City Department of Social Services. That report indicated that:

- a. L.J. was seen at Johns Hopkins Hospital on July 28, 1981, he had numerous cuts on his chest area and other parts of the body, and suffered from chronic poor hygiene; and
- b. The foster mother who accompanied L.J. was intoxicated.

L.J. was only six years old at the time of this report.

99. The report of suspected abuse of July, 1981 was the second report of suspected abuse for L.J. submitted to the Baltimore City Department of Social Services.

100. Despite the fact that the Baltimore City Department of Social Services received the report of suspected abuse for L.J. on July 29, 1981,

no investigation of any kind was conducted until August 20, 1981.

101. On or about August 19, 1981, Defendant Gibson visited L.J.'s foster home. During that visit Defendant Gibson conducted an interview of L.J. The entire interview was conducted in the home and in the presence of the foster mother. During her interview Defendant Gibson noted the following:

- a. The home situation was very chaotic with people, some related and others unrelated to the foster mother, constantly going in and out of the house.
- b. L.J. had both old and new scars and injuries.

c. L.J.'s foster mother admitted that she and L.J.'s mother were drinking buddies.

d. L.J. asked if he could go and live with someone other than the foster mother.

102. Following the second report of suspected abuse on July 29, 1981, Defendant Gibson did not obtain a medical examination of L.J. Instead, she relied upon the foster mother's statements that L.J.'s injuries were the result of playing, falling, or getting into fights.

103. On or about August 20, 1981, Defendants Cooper and Gibson met with other caseworkers and supervisors within the foster care and protective services divisions of the Baltimore City Department of Social Services to discuss the

July 29, 1981, report of suspected abuse. At the end of that conference they concluded that there was strong reason to question the supervision and physical care of L.J. in the foster home and that the question of the protection of L.J. remained a serious issue requiring immediate intervention.

104. At the end of the conference referred to in Paragraph 103, Defendants and Gibson reached the following additional conclusions:

- a. That there was a serious problem in L.J.'s foster home;
- b. That L.J.'s foster mother was not properly supervising L.J.;
- c. That physical abuse of L.J. was uncertain;

d. That L.J.'s development indicated neglect in the foster home.

105. Defendant Michael Warner-Burke received reports and memorandum concerning L.J.'s foster home, both about and after the August 20, 1981, conference but he failed to take any action to ensure the health and safety of L.J.

106. More than three months after the report of suspected abuse, during October and November, 1981, L.J. and his foster mother were seen for psychiatric and psychological evaluation at the Children's Mental Health Center of Johns Hopkins Hospital. Separate evaluations were conducted by a child psychologist and a child psychiatrist.

107. The child psychologist conducted interviews with L.J. and his

foster mother and completed the psychological evaluation of L.J. During and as a result of these interviews and evaluations the psychologist observed and learned the following:

- a. That L.J. had numerous scars on his face and hands;
- b. That there were numerous inconsistencies in the explanations for L.J.'s injuries given by L.J. and his foster mother;
- c. That L.J.'s clothes were filthy and his personal hygiene was very poor;
- d. That L.J. engaged in numerous self-destructive behaviors;
- e. That L.J. was in constant fear of being destroyed;

- f. That L.J. perceived himself as helpless;
- g. That there were at least four adults other than his foster mother living in the home with the foster mother and L.J.;
- h. That all the adults in the household, including the foster mother, were alcoholics and that one of the other adults in the home suffered from severe mental illness;
- i. That L.J.'s foster mother had two sons, one of whom was a drug addict and another who was incarcerated;
- j. That the foster mother beat L.J. with a belt or strap whenever he got on anybody's nerves;

- k. That the foster mother, while drunk, had assaulted the principal at L.J.'s school.

108. As a result of the interviews of L.J. and his foster mother and the evaluation of L.J., the psychologist concluded that:

- a. L.J. had special needs both in the area of cognitive and emotional functioning; and
- b. These problems were seriously aggravated by the morbid, chaotic, and abusive environment in the foster home.

109. As a result of the interviews of L.J. and his foster mother and her evaluations of L.J., the psychologist recommended to Defendants Gibson, Cooper, and WarnerBurke that L.J. be

immediately removed from the home of his foster mother.

110. The separate psychiatric consultation described in paragraph 106 was conducted with a child psychiatrist who interviewed L.J. and L.J.'s foster mother. During the interviews, the psychiatrist observed or learned the following:

- a. That L.J. was covered with scratches, healed lacerations, and other evidence of multiple non-accidental injuries;
- b. That L.J.'s explanations for the injuries were contradictory;
- c. That L.J. threatened to run away from the foster home and the foster mother threatened to give him away;

- d. That L.J. was permitted to roam the streets, exploring empty houses in the community;
- e. That the foster mother was not aware of L.J.'s lack of progress and poor behavior in school.

111. As a result of the psychiatrist's observations and evaluations, he concluded that:

- a. L.J.'s foster home was a chaotic setting that was the major cause of much of L.J.'s serious behavioral problems in the school and the community; and
- b. The home of L.J.'s foster mother was not conducive to a child's development and well-being.

112. As a result of psychiatrist's interviews and evaluations, he recommended to Defendants Gibson, Cooper, and Warner-Burke that L.J. be immediately removed from the home of the foster mother.

113. On October 15, 1981 and October 23, 1981, Defendant Gibson spoke with L.J.'s psychologist. During those conversations, the psychologist explained both her findings and recommendations and those of the child psychiatrist who had seen L.J. and his foster mother.

114. Defendants Cooper and Warner-Burke knew or had reason to know the findings, observations, conclusions, and recommendations of L.J.'s psychologist and psychiatrist.

115. The observations, findings, conclusions, and recommendations of L.J.'s psychologist and psychiatrist were incorporated into written reports completed on or about December 1, 1981.

116. On or about December 1, 1981, Defendants Gibson, Cooper and Warner-Burke had access to the written reports of L.J.'s psychologist and psychiatrist.

117. After receiving the reports or learning about the recommendations of L.J.'s psychiatrist and psychologist in December, 1981, Defendants Gibson, Cooper, and WarnerBurke failed to remove L.J. from the foster home or to take any other steps to protect him.

118. From December, 1981 until November, 1983, Defendants Gibson, Cooper, and WarnerBurke did not visit the home of the foster mother nor make

any other attempt to ascertain the condition of L.J.

119. L.J. continued to suffer from the abusive, neglectful, and inhumane treatment of the foster mother until January, 1984, when he was emergently removed from the foster home as a result of the foster care review hearing conducted in the Circuit Court for Baltimore City, Division for Juvenile Causes. He was subsequently committed to the care and custody of the Baltimore City Department of Social Services for specific placement in a residential treatment center.

120. As a direct and proximate result of the abuse, neglect, and inhumane treatment he suffered while in the foster home and of the failure of Defendants Holcombe, Gibson, Thomas,

Cooper, and Warner-Burke to assure that he received appropriate supportive services while in the community, L.J. is severely emotionally disturbed and his condition has required his temporary placement in a psychiatric hospital and subsequent long-term commitment to a residential treatment center for emotionally disturbed and deprived children.

121. At no time did Defendants Gibson, Thomas, Cooper, or Warner-Burke make any attempt to remove L.J. from the abusive foster home even though they had personally observed the care he was receiving in the foster home or received reports about it and had concluded that it was not in his best interest to remain there.

122. At no time did Defendants Gibson, Cooper, or Warner-Burke make any attempt to remove L.J. or to protect him from the abusive and neglectful conditions in the foster home even though they knew that two psychologists and a psychiatrist had recommended L.J.'s removal from the foster home.

123. Defendants Holcombe, Gibson, Thomas, Cooper, and Warner-Burke's failure to protect L.J. from harm, to attend school conferences, to monitor his progress in school, to provide counseling and other supportive services for him, to make frequent visits to the foster home, to re-evaluate L.J.'s foster home, and to remove him from the abusive and neglectful foster home in which they had placed him was the result, in part, of the Baltimore City

Department of Social Services' practices of assigning excessive caseload to caseworkers and leaving foster care cases unassigned for substantial periods of time.

124. Throughout L.J.'s placement in foster care, Defendants Holcombe, Gibson, Thomas, Cooper, and Warner-Burke did not have a case plan for him until approximately one month before the juvenile court's review of his case in January, 1984.

125. Throughout L.J.'s placement in foster care, Defendant Holcombe, Gibson, Thomas, Cooper, and Warner-Burke failed to conduct periodic reviews of L.J.'s case.

126. Throughout L.J.'s placement in foster care, Defendants Holcombe, Gibson, Thomas, Cooper, and Warner-Burke

failed to provide services to L.J. and his mother in order to improve conditions in his mother's home and to facilitate L.J.'s return to his mother.

127. Throughout L.J.'s placement in foster care, Defendants Holcombe, Gibson, Thomas, Cooper, and Warner-Burke did not provide, encourage, or facilitate visits between L.J. and his mother.

128. The injuries suffered by L.J. as outlined more specifically in Paragraphs 69 and 127 are a direct and proximate result of the failure of Defendants Holcombe, Gibson, Thomas, Cooper, Warner-Burke, and John Roes 1 and 2 to properly investigate and supervise the foster home, to provide L.J. with the appropriate supportive and rehabilitative services while in the foster home, to have a case plan for

L.J., to conduct periodic reviews of his case, and to respond to reports of suspected abuse in the foster home.

129. L.J. remains committed to the Baltimore City Department of Social Services and is subject to replacement by that agency.

O.S.

130. On January 6, 1984, pursuant to a voluntary agreement between her natural mother and the Baltimore City Department of Social Services, O.S., then three months old, was placed in the foster home of Mrs. Paula J.

131. The foster home of Mrs. Paula J. was licensed, approved, and under the direct supervision of the Baltimore City Department of Social Services, its agents, and employees.

132. Defendants John Roes 3 and 4 were responsible for and did in fact approve the foster home of Mrs. Paula J. as meeting the standards for foster homes under the federal and state law.

133. O.S.'s foster mother was incapable of providing proper care for O.S. which Defendants Fulton, DeWatkins, Zinkand, Warner-Burke, and John Roes 3 and 4 knew or should have know if O.S.'s foster home had been adequately investigated, screened, and supervised.

134. On January 20, 1984, O.S. was examined at Rosemont Community Doctors Center. Defendant Gail Fulton brought O.S. to this appointment and reported that the foster mother had problems feeding the child. O.S.'s weight was 8 pounds 12.5 ounces on January 20, 1984. Defendant Fulton was instructed by the

Center's physician to bring O.S. back to the clinic within two weeks so that the baby's weight and development could be monitored. On January 20, 1984, O.S.'s growth and development were appropriate for her age.

135. Defendant Fulton did not bring O.S. to medical appointments scheduled for her at the Rosemont Community Doctors Center on February 3, 1984 and February 10, 1984.

136. On February 21, 1984, O.S. was brought to the Rosemont Community Doctors Center and from there sent immediately to Johns Hopkins Hospital and left there by Defendant DeWatkins and the foster mother. This was the first time she had been seen for medical care and follow-up since January 20, 1984.

137. On February 21, 1984, O.S. was admitted to Johns Hopkins Hospital. Upon admission she was emaciated and malnourished. She had gained no weight since January 20, 1984.

138. From the first day of her admission to Johns Hopkins Hospital and throughout the course of her hospitalization there, O.S. consistently and rapidly gained weight.

139. Following O.S.'s admission to Johns Hopkins Hospital on February 21, 1984, O.S.'s physician at Johns Hopkins Hospital made several attempts to contact the foster mother to discuss her care of O.S., but the foster mother cancelled several appointments and did not provide the much needed medical history until February 25, 1984.

140. The foster mother, did not know how to properly feed O.S. in that:

- a. She believed that O.S. then four months old, could be fed like an adult;
- b. She mixed formula with incorrect proportions of water, formula and rice cereal;
- c. She fed O.S. formula that had been improperly diluted with water;
- d. She fed O.S. inappropriate food and drink; and
- e. She chewed up hot dogs, hamburgers, french fries, pork and beans, corn, and other foods, regurgitated them and fed them to O.S.

141. As a result of the facts alleged in Paragraphs 130 through 140,

O.S. suffered pain, was deprived of proper nourishment, did not gain any weight during the fourth month of her life, and did not receive appropriate medical care during that period of time.

142. O.S.'s failure to gain weight during her placement in the foster home of Mrs. Paula J. was a direct result of the foster mother's improper knowledge concerning the feeding of infants and her improper feeding of O.S. The foster mother knew or should have known that O.S. was not gaining weight, but she did not seek medical advice or attention for O.S.

143. On March 2, 1984, O.S. was transferred to Mount Washington Pediatric Hospital for further care, monitoring, and treatment.

144. During her hospitalization at Mount Washington Pediatric Hospital, the multidisciplinary staff of the hospital evaluated O.S.'s growth and development. They observed or concluded that she suffered from neurologic deficits and partial weakness of the limbs. Additional developmental delays were noted which require further consultation and evaluation by a neurodevelopmental specialist.

145. On April 19, 1984, O.S.'s placement in the care and custody of the Baltimore City Department of Social Services was continued under an order of shelter care from the Circuit Court for Baltimore City, Division for Juvenile Causes, pursuant to Md. Cts. & Jud. Proc. Code Ann. §3-815.

146. Between January 21, 1984, and February 21, 1984, neither Defendant Fulton nor Defendant DeWatkins visited or called the foster home of O.S. to monitor her progress there.1

147. Defendants Fulton, DeWatkins, and Zinkand knew or should have known that O.S. was a fragile child at risk of failure to thrive. They were aware of the need for close medical follow-up of O.S.'s growth and development during January and February, 1984 and with gross and wanton negligence and deliberate indifference failed to ensure that such follow-up was provided.

148. The harms suffered by O.S. as alleged in Paragraphs 134 through 144 were the proximate result of the failure of Defendants Warner-Burke, Zinkand, Fulton, and DeWatkins to properly

license, supervise, and train O.S.'s foster mother.

149. O.S. remains committed to the Baltimore City Department of Social Services and is subject to replacement by that agency.

M.S. and C.S.

150. M.S., who is twelve years old and C.S., who is six years old, are sisters who were the victims of repeated sexual attacks and sexual and physical abuse prior to their placement in foster care.

151. M.S. is a handicapped child whose disabilities included mental retardation and speech impairment prior to her entry into foster care.

152. On March 18, 1983, M.S. and C.S. were emergently removed from the custody of their mother and placed by

the Baltimore City Department of Social Services in the foster home of Alice and Charles E. On March 21, 1983, a shelter care hearing was held as a result of which the Baltimore City Department of Social Services was granted temporary care and custody of M.S. and C.S. by the Circuit Court for Baltimore City, Division for Juvenile Causes. On April 25, 1983, M.S. and C.S. were committed to the Baltimore City Department of Social Services by the Circuit Court for Baltimore City, Division for Juvenile Causes.

153. Following the Circuit Court's commitment of M.S. and C.S. to the Baltimore City Department of Social Services, the Baltimore City Department of Social Services continued M.S. and C.S. in placement with Mr. and Mrs. E.

154. The foster home of Alice and Charles E. was investigated by, approved by, and under the direct supervision of the Baltimore City Department of Social Services, its agents, and employees.

155. Defendants John Roes 5 and 6 were responsible for and did in fact approve the foster home of Alice and Charles E. as meeting the standards for foster homes under federal and state law.

156. The foster parents for M.S. and C.S. were incapable of providing proper care and supervision for M.S. and C.S. which Defendants Simmons, Baird, Lieman, John Roes 5 and 6, and Warner Burke knew or should have known if they had properly investigated, trained, and supervised the foster parents.

157. The foster parents showed no compassion, provided no affection, and were not supportive of M.S. and C.S.'s many emotional needs. The foster parents constantly belittled, ridiculed, and berated the girls in front of other children. They constantly referred to the children's natural mother in derogatory terms. The children were subjected to much derision for expressing their desire to return to their natural mother.

158. Shortly after their placement in the home of Mr. and Mrs. E., C.S. and M.S. underwent psychological evaluations and began therapy at John Hopkins Hospital. The therapist recommended that both M.S. and C.S. be seen for weekly psychotherapy to help them cope with and resolve the many abuses they

had suffered prior to coming into foster care. The therapist further recommended that the foster mother's participation in therapy was important to the girls achieving progress in therapy.

159. During the nine months that M.S. and C.S. were in her home, Mrs. E. participated in therapy with M.S. and C.S. in only three of the many sessions with M.S. and C.S. She did not assist in any other way to ensure the girls' progress in therapy. Defendants Simmons, Baird, Lieman know that the foster mother was not participating in the therapy sessions and that her failure to do so inhibited the girls' progress.

160. During the children's placement in the home of Mr. and Mrs. E. their therapist at Johns Hopkins Hospital repeatedly expressed concerns to

Defendants Simmons and Baird about the quality of care that the children were receiving in the home of Mr. and Mrs. E.

161. Defendants Simmons and Baird did not promptly or thoroughly investigate the therapist's complaints of neglect.

162. During the children's placement in the home of Mr. and Mrs. E., C.S. was subjected to inappropriate discipline. Among other abuses, she was forced by Mrs. E. to lick up her own vomit as punishment for getting sick.

163. Both C.S. and M.S. suffered emotional abuse, mistreatment, and neglect while in the foster home of Mr. and Mrs. E. which severely exacerbated the injuries and harms both girls had suffered before coming into foster care.

164. On or about December 25, 1983, Mrs. E. called the Department of Social Services and threatened to put the girls out on the street if the Baltimore City Department of Social Services did not remove them from her home.

165. On or about December 25, 1983, the children were removed from the foster home of Mr. and Mrs. E. and were separated for the first time in their lives. M.S. was placed in the home of Mr. and Mrs. James T. C.S. was placed in a group home.

166. The separation of M.S. and C.S. was against the explicit advice of the therapist who had been treating them for almost one year. Defendant Simmons, Baird, and Lieman were aware of this advice of the therapist.

167. Defendants Simmons, Baird, and Lieman did not prepare M.S. and C.S. for their separation from one another nor did they help them to understand and cope with this separation.

168. Defendants Simmons, Baird, and Lieman did not provide regular visitation or other contact between M.S. and C.S. after they were separated.

169. As a result of the actions of Defendants Simmons, Baird, and Lieman described in Paragraphs 166 through 168 M.S. and C.S. were deprived of companionship and comfort of one another.

170. The foster home of Mr. and Mrs. T. was approved by and under the direct supervision of the Baltimore City Department of Social Services, its agents, and employees.

171. Defendants John Roes 7 and 8 were responsible for and did in fact approve the foster home of Mr. and Mrs. T. as meeting the standards for foster homes under federal and state law.

172. Mr. T. had a history of emotional disturbance and a criminal record which the Baltimore City Department of Social Services, its agents, or employees knew or should have known if it had properly investigated or supervised the foster home of Mr. and Mrs. T.

173. Defendants Simmons, Baird, and Lieman knew or should have known that Mr. and Mrs. T. were incapable of providing proper care and supervision, especially for a young girl who had been the victim of repeated sexual assaults.

174. During her placement in the T. home, M.S. was repeatedly sexually abused by Mr. T., who after discovery of the abuse by his wife, attempted suicide.

175. Following the discovery of the sexual abuse of M.S. by Mr. T., Mrs. T. took M.S. and left her in the offices of the Howard County Department of Social Services. That same day M.S. was admitted to the University of Maryland Hospital, Child Psychiatry Unit.

176. As a direct and proximate result of the abuse and neglect of M.S. in the foster homes of Mr. and Mrs. E. and Mr. and Mrs. T., M.S. is a severely emotionally disturbed child who has now required hospitalization in a psychiatric facility and will require longterm

treatment in a psychiatric facility or residential treatment center.

177. The harms, injuries, and abuses suffered by M.S. and C.S. in the foster home of Mr. and Mrs. E. were a direct and proximate result of the failure of Defendants Simmons, Baird, Lieman, and John Roes 5 and 6 to adequately investigate, license, and supervise the E.'s foster home.

178. The harms, injuries, and abuses suffered by M.S. in the foster home of Mr. and Mrs. T. were a direct and proximate result of the failure of Defendants Simmons, Baird, Lieman, and John Roes 7 and 8 to adequately investigate, license, and supervise the T.'s foster home.

179. Throughout M.S. and C.S.'s placement in foster care, Defendants

Simmons, Baird, and Lieman have failed to develop a case plan for M.S. and C.S.

180. Throughout M.S. and C.S.'s placement in foster care, Defendants Simmons, Baird, and Lieman have failed to ensure that case reviews were conducted for M.S. and C.S.

181. M.S. and C.S. remain committed to the Baltimore City Department of Social Services and are subject to replacement by that agency.

R.R.

182. R.R. was the victim of sexual abuse by her natural father which began when she was approximately 12 years old and continued over a period of almost four years.

183. On February 10, 1983, R.R. was removed from the home of her natural parents by the Baltimore City Department

of Social Services and placed in the Baltimore City Department of Social Services foster home of John and Margaret K. pursuant to the emergency shelter care provisions of the Juvenile Causes Act, Md. Cts. & Jud. Proc. Code Ann. §3-801, et seq. On February 15, 1983, R.R. was committed to the Baltimore City Department of Social Services by the Circuit Court for Baltimore City, Division for Juvenile Causes.

184. The foster home of Margaret and John K. was licensed by, approved by, and under the direct supervision of the Baltimore City Department of Social Services, its agents, and employees.

185. Defendants John Roes 9 and 10 were responsible for and did in fact approve the foster home of Margaret and

John K. as meeting the standards for foster homes under federal and state law.

186. Mr. and Mrs. K. were not capable of providing proper care and supervision for R.R. which Defendants Collins, Warner-Burke, and John Roes 9 and 10 knew or should have known if they had adequately licensed and supervised the foster home.

187. During R.R.'s placement in the K. home, the foster parents repeatedly and deliberately and in the presence of other foster children taunted R.R. with the fact that she had been sexually abused, and they repeatedly suggested that she had enjoyed the abuse by her father.

188. Mr. K. constantly reminded R.R. that a previous foster child had

had sexual intercourse with him, and he persistently suggested that R.R. should do the same or that he might come up to her room some evening while she was sleeping.

189. R.R. lived in constant fear of sexual molestation by the foster father.

190. Prior to her placement in the foster home, R.R. had been attending both individual and group counseling to help overcome the trauma of sexual abuse by her father. The foster parents insisted that R.R. did not need to attend therapy and that she should stop attending. Due to fear of physical punishment or or other reprisal by the foster parents, R.R. stopped attending both group and individual counseling. Defendant Collins knew that R.R. had stopped attending therapy sessions. ■

191. During R.R.'s placement in the foster home she was repeatedly denied privacy, in that:

- a. She was compelled to share a single bed and bedroom with two other foster children.
- b. The door to the bedroom in which R.R. was sleeping had been removed and not replaced with any door, covering, or drapery.
- c. From September 1, 1983, R.R. was denied all future visits, telephone calls, or other communications with her sisters or other relatives.

192. R.R. was kept out of school several days per week by the foster parents so that she could work for the foster father's home improvement

business or keep the foster mother company. R.R. was not regularly paid for the painting and other work she performed for the foster father and her grades were substantially lowered because of the school absences.

193. The foster father repeatedly and deliberately made alcoholic beverages available to R.R. and other minor foster children and encouraged them to drink with him.

194. Beginning on or about June 1, 1983, R.R. made repeated phone calls to the Baltimore City Department of Social Services at different times of the day to request assistance and removal from the foster home. She repeatedly left messages with an agent or employee of the Baltimore City Department of Social Services requesting that a social worker

call her back. Defendant Collins did not return her phone calls, investigate her report of abuse and neglect or otherwise responded to her requests for help.

195. Beginning on or about June 1, 1983, several relatives of R.R. made repeated phone calls to the Baltimore City Department of Social Services to request R.R.'s removal from the foster home. Defendant Collins did not respond to their requests for help on behalf of R.R., nor investigate their reports of abuse or neglect, nor bring such condition to the attention of the juvenile court or law enforcement agency.

196. Between February 18, 1983 and October 1, 1983, neither Defendant Collins nor any other employee of the Baltimore City Department of Social

Services visited the foster home to talk with R.R. or to respond to her complaints about the foster home.

197. On or about October 1, 1983, a new social worker was assigned to R.R.'s case and after interviewing R.R., she immediately removed her from the foster home and placed her in the home of her natural sister.

198. Following R.R.'s removal from the foster home, the foster parents tore, cut, and otherwise destroyed the clothing of R.R. and misappropriated some jewelry that had been left behind when she was emergently removed from the foster home.

199. As a result of the foster parents' actions described in Paragraphs 183 through 194, R.R. experienced constant fear for her safety, emotional

suffering, severe mental anguish, and substantial deprivation of privacy throughout her foster care placement.

200. The facts alleged in Paragraphs 182 through 199 and the injuries described therein were the direct and proximate result of the failure of Defendants Collins and John Roes 9 and 10 to properly license, supervise, and train the foster parents.

201. The failure of Defendant Collins to properly supervise R.R.'s foster home and to respond to her and her relative's complaints of abuse and neglect was the result, in part of the Baltimore City Department of Social Services' practices of assigning excessive caseloads to workers in the Baltimore City Department of Social Services.

202. Throughout R.R.'s placement in foster care, Defendant Collins failed to develop a case plan for R.R.

203. Throughout R.R.'s placement in foster care, Defendant Collins failed to ensure that case reviews were conducted for R.R.

204. R.R. remains committed to the care and custody of the Baltimore City Department of Social Services and is subject to replacement by that agency.

P.G.

205. On July 14, 1967, P.G. who was then two weeks old, was committed to the care and custody of the Baltimore City Department of Social Services and placed in a foster home.

206. The Baltimore City Department of Social Services petitioned the juvenile court for custody of P.G. at

birth in order to ensure that P.G. received proper medical care. The Department alleged that P.G.'s older siblings had not received proper medical care and that the mother's home endangered the health and morals of P.G.

207. P.G. remained in her first foster home for almost two years. On March 12, 1969, she was placed in the foster home of Mr. and Mrs. Robert W.

208. The foster home of Mr. and Mrs. Robert W. was licensed and approved by, and under the direct supervision of the Baltimore City Department of Social Services, its agents, and employees.

209. Defendants John Roes 11 and 12 were responsible for and did in fact approve the foster home of Mr. and Mrs. Robert W. as meeting the standards for

foster homes under federal and state law.

210. P.G.'s foster parents were not capable of providing proper care for P.G. which Defendants Graves, Zuravin, and John Roes 11 and 12 knew or should have known if, prior to approving the home, they had adequately investigated it, or if, after initially approving it, they had properly supervised the foster home.

211. For more than four years, after her placement in the second foster home, from March 12, 1969 to March 29, 1973, P.G. was not seen by a physician or provided with any medical or dental care, routine or otherwise.

212. Defendant Zuravin knew as early as September, 1969, that P.G. was missing medical appointments while in

the foster home of Mr. and Mrs. Robert W., but she failed to take any action to ensure that P.G. received proper medical care.

213. On or about February 20, 1970, Defendant Zuravin received written notice that P.G. was continuing to miss clinic appointments, but she failed to take any action to ensure that P.G. received proper medical care.

214. On March 29, 1973, P.G. was seen by a physician at Baltimore City Hospital who discovered that P.G. had poor vision in the left eye. The physician referred P.G. to the Baltimore City Hospital Ophthalmology Clinic for close follow-up of the problem with her left eye.

215. P.G. was seen at the Baltimore City Hospital Ophthalmology Clinic for

several appointments in April and May, 1973, during which it was discovered that she suffered from amblyopia. The foster mother was instructed to bring P.G. back to the clinic for continued monitoring and follow-up of P.G.'s eye problem.

216. After May of 1973, P.G. missed numerous appointments at the Ophthalmology Clinic of Baltimore City Hospital and as a result, she did not receive proper medical care for her vision problems. Defendants Graves and Zuravin knew that P.G. missed appointments at the Ophthalmology Clinic and that she was not receiving proper medical care while in the foster home.

217. P.G. is now blind in her left eye as a direct and proximate result of the failure to provide prompt and

consistent medical care while she was in the foster home of Mr. and Mrs. Robert W.

218. P.G.'s blindness is a direct and proximate result of the failure of Defendants Graves and Zuravin to ensure that P.G. received proper medical treatment while in foster care.

219. The vision problems from which P.G. suffered in March of 1973 were most susceptible to treatment while she was young. Treatment for amblyopia should have continued from the time it was discovered. Every year that treatment and follow-up was not maintained, the chances for correction of the problem diminished.

220. Mrs. Robert W. was an alcoholic who eventually died from complications arising out of her alcoholism. For several years prior to her death,

Mrs. W. was hospitalized on numerous occasions for problems associated with her alcoholism. As a result of these hospitalizations, she was often out of the home for two to three months at a time.

221. Defendants Zuravin and Graves knew or had reason to know as early as March, 1974, that Mrs. W. was an alcoholic in that, among other things, the Baltimore City Department of Social Services had received reports from P.G.'s school that Mrs. W. had been drinking when she brought P.G. to school in the morning.

222. On or before September 1, 1975, Defendant Graves had observed the foster mother under the influence of alcohol and had seen her or the foster

father attempting to hide liquor bottles strewn about the house.

223. On or about September 1, 1975, Defendant Graves decided that P.G. should be removed from the foster home of Mr. and Mrs. W. and either placed in a new foster home or returned to her mother.

224. Despite reaching the conclusion in September, 1975, that P.G. should be placed in a different home, Defendant Graves took no action to replace P.G. in a suitable foster home or return her to the custody of her mother.

225. The failure of Defendants Graves and Zuravin and the Baltimore City Department of Social Services, its agents, and employees to ensure that P.G. received proper medical care and

that she was placed in a foster home which was able to provide proper care and meet her needs was due, in part, to the Department's practice of assigning excessive caseloads to workers and leaving cases uncovered for substantial periods of time.

226. P.G.'s case was uncovered for substantial periods of time including most of 1977 and six months of 1978.

227. Throughout P.G.'s placement in foster care, Defendants Zuravin and Graves have failed to develop a case plan for P.G.

228. Throughout P.G.'s placement in foster care, Defendants Zuravin and Graves have failed to ensure that case reviews were conducted by P.G.

229. Throughout P.G.'s placement in foster care, Defendants Zuravin and

Graves have not facilitated, encouraged or provided visits between P.G. and her natural mother.

230. The failure of Defendants Graves and Zuravin to provide P.G. with a case plan, to ensure that periodic reviews of her case were conducted, and to facilitate visitation with her mother was a direct and proximate cause of P.G.'s unnecessarily long placement in foster care.

231. P.G. was placed with her natural mother in August, 1984 but remains committed to the care and custody of the Baltimore City Department of Social Services and is subject to replacement by that agency.

B. INJURY TO PLAINTIFFS AND MEMBERS OF THE PLAINTIFF CLASS

232. Unless Defendants are enjoined by this court, Plaintiffs and members of the Plaintiff class, because of the actions and omissions of the Defendants will continue to suffer:

- a. Physical, psychological, and sexual abuse or neglect, mental anguish, humiliation, and pain inflicted by foster parents;
- b. Denial of necessary and timely dental and medical care and psychological and psychiatric services;
- c. Denial of case plans which are relevant to their individual needs;
- d. Deprivation of services necessary to maintain them in the community;

- e. Placement in homes in which Defendants have reason to believe that other foster children have previously been neglected, physically, emotionally, or sexually abused or deprived of minimally adequate care and supervision;
- f. Denial of frequent visitation and other meaningful contact and communication with their natural parents;
- g. Frequent separation from siblings who are also placed in foster care;
- h. Denial of adequate visitation or meaningful contact and communication among siblings in foster care;

- i. Denial of nurturance and emotional support necessary to their progress and development;
- j. Placement with foster parents who suffer from alcoholism or who have emotional or physical illnesses or criminal records, which render them unable to provide minimally adequate care;
- k. Unnecessarily long placements in foster care, denial of an opportunity for reunification with their natural families, and deprivation of alternative permanent placements when return home is not in their best interest;

l. Denial of other care, treatment and supervision which they need; and

m. Other and additional substantial harms as set forth more fully in the Complaint as a proximate result of the actions and omissions of the Defendants.

C. ACTS AND OMISSIONS OF
THE DEFENDANTS

233. The injuries suffered by L.J., O.S., M.S. C.S., R.R., and P.G. as outlined more specifically in the preceding sections of the Complaint are a direct and proximate result of Defendants Musgrove and WarnerBurke's deliberate indifference to the health, safety, and welfare of the named Plaintiffs and to other members of the

Plaintiff class. Their deliberate indifference is manifested by, inter alia:

- a. Their knowledge of, and failure to correct, a pattern and practice of using foster homes which fail to meet minimum federal and state standards for approval and licensure, which practice has existed, and continues to exist within the Baltimore City Department of Social Services;
- b. Their knowledge that most foster parents have not received training or that the training which was provided for foster parents was inadequate and their failure to

take steps to establish, maintain, and provide training for foster parents.

- c. Their knowledge that foster homes are not regularly visited and re-evaluated as required by state and federal law and their failure to correct such a practice;
- d. Their knowledge of, and failure to correct, a pattern and practice of continuing to use foster homes for the care of one member of the Plaintiff class after there has been abuse or neglect of another member of the Plaintiff in that home, which practice has existed, and continues to exist, within the Baltimore

City Department of Social
Services;

- e. Their knowledge of and failure to correct a pattern and practice of leaving the named Plaintiffs' and other foster care cases uncovered and unassigned to a caseworker for substantial periods of time which practice has existed and continues to exist within the Baltimore City Department of Social Services; and
- f. Their hiring or assignment of personnel to foster care caseloads with the knowledge that such personnel had not had sufficient training or experience to assure that the named Plaintiffs and members

of the Plaintiff class received proper care and services.

234. The injuries suffered by L.J., O.S., M.S., C.S., R.R., and P.G., as outlined more specifically in the preceding sections of the Complaint, are a direct and proximate result of the state defendants' deliberate indifference to the health, safety, and welfare of the named Plaintiffs and other members of the Plaintiff class. Their deliberate indifference is manifested by, inter alia:

- a. Their failure to regularly and properly supervise the foster care and child welfare services programs operated by the city defendants and to take corrective action when made

aware of gross deficiencies in those programs and of practices of the city defendants which endangered the life and safety of the named Plaintiffs and members of the Plaintiff class;

- b. Their failure to act upon reports of abuse in foster homes supervised by the city defendants, which were submitted to the General Registry of Child Abuse operated by the state defendants;
- c. Their knowledge of several studies documenting that there were excessive caseloads for foster care workers in the Baltimore City Department of Social Services and that those

excessive caseloads prohibited caseworkers from providing minimally adequate care and service to Plaintiffs and members of the Plaintiff class and their failure to act upon such studies to ensure that the Baltimore City Department of Social Services had sufficient numbers of caseworkers and caseworker supervisors to provide adequate licensing, monitoring, and supervision of foster homes and to provide supportive and rehabilitative services to Plaintiffs and members of the Plaintiff class;

- d. Their failure to establish and maintain minimum standards for

the hiring and training of caseworkers and caseworker supervisors who are responsible for the protection of Plaintiffs and members of the Plaintiff class;

- e. Their failure to establish and maintain minimum standards for both initial training and periodic supplemental training of Plaintiffs' foster parents and foster parents for members of the Plaintiff class; and
- f. Their failure to take appropriate personnel action against the city defendants for nonfeasance in fulfilling their duties to Plaintiffs and members of the Plaintiff class.

235. The Defendants have failed:

- a. To maintain and apply the standards for safety, sanitation, and civil rights which have been established for foster children in foster family homes;
- b. To develop case plan and case review systems that maintain appropriate foster care placements, assure proper care and services for foster children, and meet the best interests and special needs of the children in the most familylike settings available;
- c. To assure that services are provided to the child, parents, and foster parents to improve conditions in the

parents' home and to facilitate return of the child to his own home or other permanent placement of the child;

- d. To make in each case reasonable efforts to make it possible for the foster child to his parents' home;
- e. To bring matters to the attention of the appropriate court or law enforcement agency when the Defendants have had reason to believe that the foster home in which the child resides is unsuitable because of the neglect, abuse, or exploitation of such child;
- f. To ensure that investigations of abuse and neglect are

promptly initiated, that investigations are made by properly constituted authorities other than Defendants and their agencies when a report of abuse or neglect concerns a foster home supervised by Defendants, and that, upon a finding of abuse or neglect, immediate steps are taken to protect the health and welfare of the child.

236. The Defendants have failed to maintain and apply the standards that they have established for foster homes and foster parents pursuant to the Social Security Act. Among the standards they have failed to maintain and apply are requirements that:

- a. Foster parents selected by the agency must be capable of providing good parenting and foster homes approved by the agency must meet certain requirements for foster family homes;
- b. Foster parents and members of their families must be in good mental and physical health;
- c. Foster parents must have knowledge, interest in, and practice principles of good child care;
- d. Foster parents must have the maturity and personality characteristics such that they provide an emotion climate in which the child can grow and mature and have the maximum

opportunity for healthy personality development;

- e. Foster parents' age and strength must be such that they can meet the needs of the foster children placed with them;
- f. Foster parents must support and encourage children to attend school regularly and to make progress therein, and provide the child with adequate clothing and other supplies necessary for their participation in all school programs;
- g. The foster home must meet public health and sanitary requirements of the local health department;

- h. The foster home must have accessible space for outdoor activity, free from conditions dangerous to the health and safety of children;
- i. The foster home must provide each child with sleeping space, privacy, and his own individual bed;
- j. The foster home must be adequately furnished and provide children with items essential to basic health and comfort, including but not limited to adequate bedding, linens, and other personal essentials.

237. Among the standards Defendants have established pursuant to the Social Security Act for the city defendants to

follow that they have failed to maintain and apply are requirements that the city defendants:

- a. Maintain staff sufficient in number and qualification for the agency to carry out its foster care responsibilities;
- b. Assure that staff are qualified for their assignments and that they are regularly and consistently supervised by staff with professional training in social service and with experience in social work and practice;
- c. Provide continued training and development of all staff members and other additional help to enable staff to

develop professional competence;

- d. Maintain proper medical and casework records;
- e. Select and maintain foster homes in sufficient number and variety to provide for the types of children for whom the agency is responsible;
- f. Recognize when a child needs psychological and psychiatric service and assure that the child receives whatever he needs;
- g. Assure that children in their care receive physical and dental examinations at least annually and that the medical and dental care recommendations are followed;

- h. Closely supervise and regularly re-evaluate the child's growth and development in the foster home. Re-evaluations must be conducted by the city defendants 90 days after the child's initial placement, 180 days after placement, and at least once every six months thereafter, or more frequently if there is a substantial change in the child's circumstances;
- i. Provide supportive caseworker and rehabilitative services to the child who is in foster care;
- j. Upon receiving a report of suspected child abuse, make a thorough and prompt

investigation of that report, including an on-site investigation within twenty-four (24) hours during which the city defendants, its agents, and employees must see the child, attempt to have an on-site interview with the child's caretaker, and decide on the health, safety, and wellbeing of the child;

- k. Upon receiving a report of suspected child neglect, make a thorough and prompt investigation of that report, including an on-site investigation within five (5) days during which the city defendants, its agents, and employees must see the child, attempt to have an

on-site interview with the child's caretaker, and decide on the health, safety, and well-being of the child.

238. Since at least 1975, Defendants have been aware, based on a series of studies conducted at their behest, that the city defendants have been unable to carry out their legal responsibilities to foster children because worker/caseload ratios were much too high to ensure minimally adequate care and services to such children and their families.

239. Many of the Plaintiffs' cases and large numbers of cases of the Plaintiff class have been or are not assigned to any caseworker for substantial periods of time.

240. The city defendants constantly reassign cases of foster children with the result that Plaintiffs and members of their class are denied all continuity in casework and case plans are not developed, revised, or implemented for them.

241. The foster care and child welfare services programs are operated by the city defendants and are subject to the supervision, direction, and control of the state defendants.

242. The state defendants have a duty to supervise and ensure that the city defendants' actions with regard to foster children comply with state and federal laws and regulations.

243. At all times pertinent to this Complaint, Defendants' acts, policies, practices, and omissions which are

referred to in this Complaint occurred and continue to occur under color of state law, statute, ordinance, regulation, custom, or practice.

244. The state defendants knew or had reason to know that the city defendants operated their foster care program in contravention of federal laws and regulations as set forth more particularly in Paragraphs 65 through 237.

245. The state defendants have failed to properly supervise the foster care and child welfare services programs directly operated by the city defendants and to take necessary remedial action.

246. The state defendants have failed to ensure that the city defendants maintain the licensing standards required by federal law for every foster home used by the city defendants for

placement of Plaintiffs and members of their class.

247. The state defendants have consistently ignored substantial evidence of mismanagement and nonfeasance by the city defendants who are or have been responsible for foster care services provided to Plaintiffs and members of their class. The state defendants have failed to act upon the knowledge of the city defendants' pattern and practice of improperly supervising and failing to close foster homes in which abuse and neglect was extensively documented in agency case records.

248. At all times pertinent to this Complaint, Defendants knew or should have known of the actions and omissions referred to in this Complaint and of the adverse effects of those actions and

omissions upon Plaintiffs and members of their class.

249. At all times pertinent to this Complaint, Defendants had the ability and the authority to remedy the wrongful acts and omissions referred to in this Complaint.

250. The conditions described in Paragraphs 65 through 249 have occurred and continue to occur because of the willful and intentional acts, policies, and omissions, or gross and wanton negligence, or deliberate indifference of the Defendants in this action.

FIRST CAUSE OF ACTION

251. 42 U.S.C. §§671(a)(3) and (4) require that the Title IV-E foster care program be in effect statewide, be

mandatory on local agencies that administer the program, and be coordinated with the state's IV-B program.

252. 42 U.S.C. §§671(a)(1) and 672(c) require the state to make payments for certain children in foster care. Each such child is entitled to have foster care maintenance payments made on his or her behalf while he or she is in a foster family home, and each such home must be "licensed by the State in which it is situated or . . . approved, by the agency of such state having responsibility for licensing homes of this type, as meeting the standards established for such licensing."

253. 42 U.S.C. §671(1)(10) requires Defendants to establish, maintain, and apply standards of, inter alia, safety,

sanitation, and civil rights for foster children in foster family homes receiving funds under either Title IV-B or Title IV-E. Such standards must be reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes.

254. 42 U.S.C. §§627(a)(2)(B), 671(a) (16), 675(1), and 675(5) and 45 C.F.R. §§1356.121 and 1357.25 require Defendants to develop a case plan and case review system that, inter alia, maintains appropriate foster care placements, assures provision of proper care and services for the child, addresses the needs of the child while in foster care, and meets the best interests and special needs of the child.

255. By placing Plaintiffs and members of their class in foster homes wherein they have been neglected, abused, or exploited, by failing to maintain and apply standards of minimal safety, sanitation, and civil rights for foster children in foster families, including those standards set forth in paragraphs 60 and 61, and by placing children in inappropriate foster care placement, denying said children care and services necessary to address their needs and meet their best interests and special needs, Defendants have deprived Plaintiffs and members of the class of their rights under 42 U.S.C. §§671(a) (1), (3), (4), (9), (10), (16), 672(c), 675(1), 675(5), 627(a)(2), 45 C.F.R. §§1355-1357, and the Due Process Clause

of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

256. Pursuant to 42 U.S.C. §671(a)(9) and 45 C.F.R. §1356.20, Defendants are required to provide that:

where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under [IV-E or IV-B] is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency.

42 U.S.C. §671(a)(9).

257. 42 U.S.C. §5103(b)(2)(c) requires Defendants to ensure that

investigations of reports of suspected abuse and neglect are promptly initiated and that, upon a finding of abuse or neglect, immediate steps are taken to protect the health and welfare of the abused or neglected child.

258. 45 C.F.R. §1340.14(3) requires Defendants, upon receipt of a report of abuse or neglect in a foster home approved by and under the supervision of the local Department of Social Services, to ensure that the investigation is made by some properly constituted authority other than the local Department of Social Services or the Social Services Administration.

259. By failing to investigate promptly reports of suspected abuse and neglect of Plaintiffs and members of their class, by failing to bring the

abuse, neglect, or exploitation of Plaintiffs and members of their class to the attention of the juvenile court or law enforcement officials, by failing to take immediate steps to ensure the health and well-being of Plaintiffs and members of their class once abuse or neglect has been discovered in a foster home, and by failing to ensure that investigations of abuse and neglect in homes supervised by Defendants are made by other properly constituted authorities, Defendants have deprived Plaintiffs and members of their class of their rights under 42 U.S.C. §674(a)(9) and §§5103(b)(2), 45 C.F.R. §§13450.14 (e) and 1356.20, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

THIRD CAUSE OF ACTION

260. 42 U.S.C. §§627(a)(2)(B), 671(a) (16), and 675(1) require that each child's case plan assure that services are provided to "the parents, child, and foster parents in order to improve the conditions in the parents' home, [and] facilitate return of the child to his own home or the permanent placement of the child" Furthermore, Defendants must make "in each case, reasonable efforts to make it possible for the [foster] child to return to his home." 42 U.S.C. §671(a)(15); 45 C.F.R. §1356.21.

261. Defendants' failure to ensure that Plaintiffs and members of the Plaintiff class have case plans and obtain services that facilitate the

return of the children to their own homes or other permanent placement of the children and Defendants' failure to make reasonable efforts to make it possible for the children to return home, violate 42 U.S.C. §§671(a)(15), (16), 627(a)(2), 675, 45 C.F.R. §§1356.21 and 1356.25, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

VII. PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs on their own behalf and on behalf of all others similarly situated respectfully pray that this Honorable Court:

1. Assume jurisdiction of this action;

2. Declare this a class action under Fed. R. Civ. P. 23(b)(2) as soon as practical as set out in Fed. R. Civ. P. 23(c)(1);
3. Enter a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202, that state and city defendants' policies and practices have denied Plaintiffs and members of their class due process of law as guaranteed by the Constitution of the United States and that such policies and practices violate provisions of and rights secured by the Social Security Act and regulations promulgated pursuant thereto, 42 U.S.C. §§671(a)(1) - (4),

(9) - (11), (16), 672(c),
675(1) and (5), 627(a)(2),
5103(b)(2)(C) and 45 C.F.R.
§§1355-1357 and 1340.14(3);

4. Grant injunctions pursuant to
Fed. R. Civ. P. 65, enjoining
the state and city defendants
their successors in office,
agents, employees, and all
other persons in active
concert and participation with
them from:

- a. Licensing, maintaining,
and placing Plaintiffs
and members of their
class in foster homes
without first determining
that the foster parents
can meet the individual
needs of the child and

preparing the foster parents to meet the individual needs of each child placed in their home;

b. Licensing, maintaining, and placing Plaintiffs and members of their class in foster homes which do not meet all of the requirements established in the regulations governing care for such children and the licensing of foster homes;

c. Failing to remove Plaintiffs and members of their class from an abusive or neglectful foster home or to take

other immediate action to secure their health and safety;

- d. Failing to close or take licenses away from all inadequate, dangerous, and unhealthy foster homes;
- e. Failing to regularly and properly supervise foster homes;
- f. Assigning excessive caseloads to caseworkers who are responsible for Plaintiffs and members of the class;
- g. Failing to periodically re-evaluate case plans to determine if the foster care placement in which

Plaintiffs and members of their class are residing are appropriate for the child and are meeting the child's needs;

h. Failing to conduct periodic case reviews for Plaintiffs and each member of the Plaintiff class so as to determine and promptly implement a permanent plan for them and to evaluate their growth and development in the foster home;

i. Failing to provide medical and dental, rehabilitative, and supportive services to meet the needs of

Plaintiffs and members of
their class;

j. Failing to promptly
investigate reports of
suspected abuse, neglect,
or exploitation of
Plaintiffs and members of
their class;

k. Failing to conduct
private, confidential
interviews with Plain-
tiffs and members of
their class as a part of
any investigation of a
report of suspected
abuse, neglect or exploi-
tation of Plaintiffs and
members of their class;

l. Failing to promptly
investigate complaints of

abuse and neglect reported to the city defendants by Plaintiffs and members of their class;

- m. Failing to report suspected abuse, neglect, or exploitation of Plaintiffs and members of their class to the juvenile court and local law enforcement officials;
- n. Failing to recruit and maintain adequate numbers and types of foster homes to provide proper care and supervision of Plaintiffs and members of their class;

- o. Failing to encourage, facilitate, and provide frequent and meaningful visitation between Plaintiffs and their natural parents;
- p. Separating siblings placed in foster care from one another and not providing frequent visitation, other contact and communication between siblings who are placed in separate foster homes or institutions;
- q. Leaving cases of children uncovered with no case-worker directly responsible for supervision of children;

- r. Transferring cases of children without adequate transmission of information to ensure continuity of care;
- s. Failing to ensure that children receive appropriate educational placement and services;
- t. Licensing and maintaining foster homes, and placing Plaintiffs in foster homes, without providing training to foster parents to ensure their ability to care for the children;
- u. Assigning cases to workers and supervisors who have insufficient

training to prepare them to adequately ensure appropriate care for the children who are their responsibility;

v. Failing to take appropriate action with regard to personnel who have inadequately protected children.

5. Award Plaintiff L.J. \$3 million in actual damages and an as yet to be determined amount in punitive damages against the state defendants, Baltimore City Department of Social Services, Defendant Musgrove, Michael WarnerBurke, Cheryl Gibson, Bridgette Thomas, Marylyn Holcombe,

Delores Cooper, and John Roes
1 and 2.

6. Award Plaintiff O.S. \$3
million in actual damages and
an as yet to be determined
amount in punitive damages
against the state defendants,
Baltimore City Department of
Social Services, Defendants
Musgrove, Warner-Burke, Gail
Fulton, Elvia DeWatkins, and
John Roes 3 and 4.

7. Award Plaintiff M.S. \$3
million in actual damages an
as yet to be determined amount
in punitive damages against
the state defendants, Balti-
more City Department of Social
Services, Defendants Musgrove,
Warner-Burke, Simmons, Baird,

Lieman, and John Roes 5
through 8.

8. Award Plaintiff C.S. \$3
million in actual damages and
an as yet to be determined
amount in punitive damages
against the state defendants,
the Baltimore City Department
of Social Services, Defendants
Musgrove, Warner-Burke,
Simmons, Baird, Lieman, and
John Roes 5 through 6.

9. Award Plaintiff R.R. \$3
million in actual damages and
an as yet to be determined
amount in punitive damages
against the state defendants,
the Baltimore City Department
of Social Services, Defendants
Musgrove, Warner-Burke,

Collins and John Roes 9 and 10.

10. Award Plaintiff P.G. \$3 million in actual damages and an as yet to be determined amount in punitive damages against the state defendants, the Baltimore City Department of Social Services, Defendants Musgrove, Warner-Burke, Graves, Zuravin and John Roes 11 and 12.

11. Award reasonable attorney fees and costs to Plaintiffs' attorney pursuant to 42 U.S.C. §1988.

12. Grant the named Plaintiffs a jury trial on the limited issue of monetary damages -

both compensatory and punitive.

13. Award Plaintiffs and members of the class any and all other relief as may be deemed appropriate by this court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on December 5, 1984, a copy of the Motion for Leave to Proceed Anonymously, Affidavit of William L. Grimm in Support of Motion for Leave to Proceed Anonymously, Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Proceed Anonymously, Proposed Order, and Affidavits of Plaintiffs in Support of Motion to Proceed in Forma Pauperis, was personally delivered to Ralph S. Tyler, Assistant Attorney General, Munsey Building, Calvert and Fayette Streets, Baltimore, Maryland 21202.

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Attorney for Plaintiffs

No. 87-1796

Supreme Court, U.S.
FILED
JUN 1 1988

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L.J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE STATES OF ALABAMA, DELAWARE,
IDAHO, LOUISIANA, NORTH CAROLINA,
SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA,
WEST VIRGINIA AND WISCONSIN
AS *AMICI CURIAE* IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are social workers subject to actions for damages under 42 U.S.C. §1983 and deprived of the defense of qualified immunity for alleged violations of the foster care funding provisions of the Social Security Act?

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No. 87-1796

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RUTH MASSINGA, et al.,

Petitioners,

v.

L.J., et al.,

Respondents.

BRIEF OF THE STATES OF ALABAMA, DELAWARE,
IDAHO, LOUISIANA, NORTH CAROLINA,
SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA,
WEST VIRGINIA AND WISCONSIN
AS AMICI CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Amici are states that receive federal grants available under the Social Security Act to operate foster care programs. 1/ Thousands of their

1/ Because this brief is filed on behalf of States by their respective attorneys general, consent to its filing is not required. See Sup. Ct. R. 36.4.

employees, including caseworkers, supervisors and administrators, make difficult and delicate decisions to carry out these programs. Amici have an acute interest in the Fourth Circuit's decision to deprive foster care workers of qualified immunity and subject them to damage suits under §1983 for alleged breaches of funding statutes.

This Court has never held that State officials must stand trial for damages for actions performed under a statute enacted by Congress under the Spending Clause. Until the decision in L.J. v. Massinga, 838 F.2d 118 (4th Cir. 1988), no circuit court had held that damages are available under §1983 against state officials who violate the foster care statutes. Amici share a grave concern that this unprecedented decision will subject their employees to numerous damage suits by children in foster care for decisions made decades ago. Because the Fourth Circuit decision has a truly staggering impact on all state officials who administer federal grant programs, amici

respectfully request this Court to grant the petition and review the decision in this case.

STATEMENT OF THE CASE

Plaintiffs filed individual damage actions, along with claims for class declaratory and injunctive relief, against twenty individual state administrators, supervisors and caseworkers of the foster care program administered by a local unit of Maryland's Department of Human Resources. Defendants filed, in response to the money damages claims, a motion for partial summary judgment based on the qualified immunity doctrine. The district court denied the motion and the court of appeals affirmed. Without deciding whether defendants had a constitutional duty to protect children in foster care, the Fourth Circuit held that defendants had a clear and certain statutory duty and therefore they were not entitled to the qualified immunity defense.

REASONS FOR GRANTING REVIEW

I. The Federal Foster Care Statute Creates No Cause of Action for Damages under the Civil Rights Act.

The court of appeals wrongly assumed that rights based on a federal grant statute are enforceable through §1983 damage actions. Settled doctrine of this court, and its special treatment of Spending Clause cases, strongly suggest that plaintiffs assert no rights enforceable under §1983.

Although this Court held in Maine v. Thiboutot, 448 U.S. 1 (1980) that §1983 is enforceable to enforce violations of federal statutes by state officials, Pennhurst State School and Hospital v. Halderman (I), 451 U.S. 1 (1981) and Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19 (1981) recognized two exceptions to the remedial use of §1983: where Congress has foreclosed enforcement of the statute and where the statute did not

create enforceable rights within the meaning of §1983. Pennhurst (I) further required an explicit expression of intent by Congress to create enforceable rights when enacting grant-in-aid programs under its spending power. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." 451 U.S. at 17.

For this reason, damages are unavailable when a plaintiff alleges only a deprivation of rights secured by a Spending Clause statute. See Guardians Assn. v. Civil Service Commission of the City of New York, 463 U.S. 582, 602 n. 23 (1983). This Court observed in Pennhurst (I) that it has never required a State to provide money to plaintiffs to remedy violations laws enacted under the spending power. 451 U.S. at 29. Because this Court has required Congress to "speak with a clear voice," when imposing conditions on the grant of federal monies, Id. at 17, this Court has never authorized a damage action under §1983 to enforce

rights under a funding statute. Accord Guardians Assn., 463 U.S. at 596 ("make whole remedies," including damages, are ordinarily not appropriate in private actions alleging violations of the terms of federal grants).

Nowhere in the foster care statute did Congress confer on children rights "sufficiently specific and definite to qualify as enforceable rights under Pennhurst and §1983." Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S.Ct. 766, 775 (1987) 2/ The right the court of appeals found to be legally enforceable -- plaintiffs' statutory right to "care and protection" -- was "clear and certain" since 1961 when Congress first made federal funds for foster care available. See L.J. v. Massinga, supra, 838 F.2d at 122.

2/ The court of appeals mistakenly relied on Wright to discover a right to damages in an appropriations statute. But Wright involved equitable relief, including a request for an injunction and restitution, not money damages. See Wright, supra, at 770 n.5.

Amici submit that the Fourth Circuit is plainly wrong. Not until the courts below found a right to damages under §1983 in this case were states placed on notice that acceptance of foster care funds could strip its officials of their immunity. Heretofore, this Court had gone only so far as to establish a right to prospective injunctive relief for violations of the Social Security Act. See Rosado v. Wyman, 397 U.S. 397 (1979); Miller v. Youakim, 440 U.S. 125 (1979); King v. Smith, 392 U.S. 309 (1968).

This Court has limited legally enforceable rights to those sufficiently specific and definite to enable states to exercise their choice to accept funds knowingly. See Pennhurst (I), supra, 451 U.S. at 17. But here, the Fourth Circuit derives a right to seek damages under §1983 from a funding statute, a result no state could have reasonably foreseen when it decided to participate in a federal program.

This sweeping holding has an enormous impact on federal grants administered by amici. The Fourth Circuit's decision requires not only social workers but all officials employed by amici involved in these programs to stand trial for damages for asserted violations of a federal funding statute. Public agencies already hard-pressed to retain trained staff will be unable to protect their employees from harassing litigation and, ultimately, personal monetary liability. See Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3038 (1987) (substantial social costs of permitting damage actions against governmental officials). Permitting a federal court to inject itself into volatile questions of child welfare -- matters more akin to state tort than federal civil rights law -- will certainly stimulate more litigation but is unlikely to improve the welfare of American families. See DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298, 304 (7th Cir. 1987), cert. granted, No. 87-154. Not

only will amici be compelled to weigh whether future acceptance of funds justifies the risk to its employees, amici will have unwittingly exposed its employees to second guessing of thousands of decisions spanning decades of serving children. Surely, Congress could not have intended this result.

II. The Eleventh Amendment Bars Plaintiffs' Damage Claims Because The State is the Real Party in Interest.

The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." Pennhurst State School and Hospital v. Halderman (II) 465 U.S. 89, 101 (1984). Damage actions seeking to impose personal liability on state officials generally are not attacks on the public treasury and, therefore, are permissible. See Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974) However, even injunction suits may place demands on the state fisc and, thus, the difference between permissible

and impermissible relief "will not in many instances be that between day and night." Edelman v. Jordan, 415 U.S. 651, 667 (1974). "[T]he general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." Pennhurst (II), supra, 465 U.S. at 107.

Here, the practical effect of a damage action under §1983 against twenty state caseworkers, supervisors and administrators in their individual capacities (assuming arguendo plaintiffs assert legally enforceable rights) is to implicate the public treasury. Faced with similar broad-based attacks on their foster care programs and the state employees who administer them, amici could abandon these officials only at their peril.

Amici are acutely aware of the difficulty of the tasks these social workers perform and the risk they undertake for the common good. While no state could in every case promise to indemnify an employee discharging public duties, it is equally

true that no state could categorically withhold its funds from officials who suffer the entry of damage awards against them. Amici need trained social workers to administer their programs. The interests of the state and its employees are not like "day and night." Amici are responsible for operating foster care program and, out of necessity, are responsible for those working in these programs. The State is the real party in interest in this case, and, therefore is immune from these damage actions under the Eleventh Amendment.

CONCLUSION

For the reasons stated herein and in the petition, amici respectfully urge this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

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No. 87-1796

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L.J., *et al.*,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS*
CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION
OF SOCIAL WORKERS IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Were legal duties enforceable by damage suits under 42 U.S.C. §1983 "clearly established" by the 1961 foster care provision of the Social Security Act so as to deprive social workers of the defense of qualified immunity?

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MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND BRIEF OF THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS
IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI

MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE

National Association of Social Workers hereby respectfully moves for leave to file the within brief as amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for petitioners has been obtained. The

consent of the attorney for respondents was requested but refused.

Amicus is the largest association of social workers in the United States with over 115,000 members. It develops and seeks to improve professional standards in many fields of social work practice, including child welfare services. Many of its members work for state governments providing services to children in foster care and to families at risk.

Amicus has a greater familiarity with the professional demands on social workers than the parties in this case. From its unique perspective, amicus believes the court of appeals holds social workers to unrealistic and ill-defined standards of performance. If granted leave by this Court, amicus will show that the holding does not benefit American families and their children and, ultimately, will impair the effectiveness of the profession.

Amicus is better able than the parties to explain the practical effect of the denial of the qualified immunity defense in this case on the profession and those served by it. In holding that a 1961 funding statute established a clear duty of protection, the court of appeals erodes the qualified immunity defense in favor of a doctrine of unlimited liability. Requiring that social workers satisfy a vague standard of performance exposes them to second guessing for thousands of difficult decisions made decades ago. The Fourth Circuit falsely assumes that social work practice has over the last twenty years provided definitive guidelines for public agency workers to help them avoid harm to children in foster care. To the contrary, amicus recognizes that no professional concensus on standards exists even now and that maltreatment of children in foster homes often is difficult, and at times impossible, to prevent by even a very highly skilled and well-tranied social worker.

The court of appeals' discovery of a clearly established duty to protect foster children does not clarify the social worker's job or change the complexity of the judgments he makes. But it does unnecessarily and unfairly increase his risk. And by adding a further element of risk to a job that already offers limited economic and other incentives it will spur the exodus of child welfare workers from the public sector and will deter a new generation of social workers from entering this field of service. For all these reasons, amicus respectfully requests this Court to grant it leave to file its brief.

BRIEF OF AMICUS CURIAE

Statement of the Case

Plaintiffs are individual foster children and a class of foster children. They filed individual damage actions and claims for class declaratory and injunctive relief against twenty individual state administrators, supervisors and caseworkers

of the Baltimore City Department of Social Services foster care program. Invoking the qualified immunity defense in response to the damage claims, defendants filed a motion for partial summary judgment. The district court denied the motion. On appeal to the Fourth Circuit, defendants argued that neither a constitutional nor statutory duty to protect foster care children was clearly established. The court of appeals held that defendants had a clear and certain statutory duty and therefore they were not entitled to the immunity defense; the court did not decide whether defendants had a constitutional duty to protect children in foster care.

Reasons for Granting Review

- I. Defendant Social Workers Did Not Violate Clearly Established Law and, Therefore, May Not Be Deprived of the Qualified Immunity Defense.

The Fourth Circuit was wrong to hold that foster children have a clearly established

statutory right to care and protection enforceable through §1983 damage actions. See L.J. v. Massinga, 838 F.2d 118, 122 (4th Cir. 1988). This decision is inconsistent with settled doctrine of this Court that a government official performing discretionary duties is shielded from liability for damages insofar as his conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Unless the law clearly proscribed the actions taken by an official, he is immune from suit. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

Contrary to the holding of the court of appeals, the 1961 foster care provision, 42 U.S.C. §608(f) (repealed in 1980) did not create clearly established rights of foster children to care and protection. (App. 73a-78a). The case plan requirement contained in that statute was not so clear that "a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, ___U.S.____, 107 S. Ct.

3034, 3039 (1987). 1/ In essence, plaintiffs charge social workers with making wrong decisions i.e. placing foster children in or failing to remove them from homes that were unsuitable. See, e.g. District Court opinion (App. 26a). 2/ By stripping social workers of qualified immunity simply for making allegedly bad decisions, the court of appeals converts the defense into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Anderson, supra, 107 S. Ct. at 3039.

It is difficult to conceive of a more abstract right than one to "care and protection." Deriving

1/ In floor debate on the Adoption Assistance and Child Welfare Act, 42 U.S.C. §627 et seq., Senator Cranston expressed the hope that new, more specific case plan requirements "will assist in providing the kind of focus for case plans that is missing under current law." 125 Cong. Rec. S15290-91 (daily ed. Oct. 29, 1979) (remarks of Sen. Alan Cranston)

2/ For example, plaintiff P.G. alleged that she was placed in a foster home where the parents were "unfit to serve as foster parents" in 1969, when she was a toddler. See District Court opinion (App. 29a).

such a right from the 1961 statute -- as the Fourth Circuit did here - does not inform social workers which of their actions are unlawful. In a well-intentioned effort to protect endangered children, the court of appeals imposes unrealistic standards of performance which the profession is unable to guarantee. 3/ A right to "care and protection" cannot be clearly established where a social worker in many difficult cases cannot assure it despite exercising reasonable skill and care. The reality is that child maltreatment is inherently difficult to predict, and often no public official is at fault or no decision is clearly correct. D. Besharov, The Vulnerable Social Worker 133 (1985). But the court of

3/ One commentator has observed that the expansion of child protective efforts over the last twenty years has not been accompanied by the development of precise standards. "Existing standards - and the decision-making they foster - are a direct reflection of society's over-ambitious expectations about the ability of social agencies and the courts to identify and protect endangered children." D. Besharov, The Vulnerable Social Worker 142 (1985).

appeals' decision sweeps so broadly that even the most careful social worker would have to stand trial if the goal of "care and protection" is not accomplished.

II. Denial of Qualified Immunity Adversely Affects Social Work Practice to the Detriment of Families and Their Children.

Until the Fourth Circuit's decision in this case, no circuit court had ever held that state social workers must stand trial for actions in violation of a statutory duty of protection. In finding such a right clearly established since 1961, and in permitting allegations of bad decisions as early as 1969 to go to trial, the court of appeals invites an entire generation of foster children to bring damage claims against social workers.

This holding will truly place public agencies charged with protecting the welfare of children "on the razor's edge." See DeShaney v. Winnebago County Department of Social Services, 812 F.2d

298, 304 (7th Cir. 1987), cert. granted, No. 87-154. This Court has recognized that the qualified immunity defense is designed to protect, not inhibit, the exercise of discretion. See, e.g. Anderson, 107 S.Ct. at 3038 (social costs of damage suits against government officials include inhibiting discharge of duties); Davis v. Scherer, 468 U.S. 183, 196 (1984) (officials routinely making close decisions should not always err on the side of caution); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974) (immunity concept assumes that risk of error better than inaction).

The harmful effects of denying qualified immunity in this case go far beyond the defendant social workers. By raising social worker vulnerability beyond what is necessary or fair, the court of appeals creates a professional environment in which avoiding liability -- rather than serving children -- becomes the goal. Professionals performing an already inherently stressful job and others

contemplating entering this field of service will seek employment elsewhere. As one expert on child abuse and neglect has observed:

[I]f liability concerns preclude responsible decision making, then the whole system will collapse. Recruiting qualified people for children's services is hard enough. Salaries are low, working conditions poor, and positive feedback from clients minimal. There are many more rewarding areas of human services work. Continued, and rising, levels of liability could lead to the ultimate defensive social work; the best people may simply avoid the field.

Besharov, supra at 138.

Social workers called upon to make difficult judgments daily can hardly be expected to continue to accept a growing risk when the courts below offer them virtually no protection in return.

CONCLUSION

For all these reasons, and as further argued in the petition, amicus respectfully urges this Court to issue a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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**On Petition for a Writ of Certiorari
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for the Fourth Circuit**

REPLY BRIEF OF PETITIONERS

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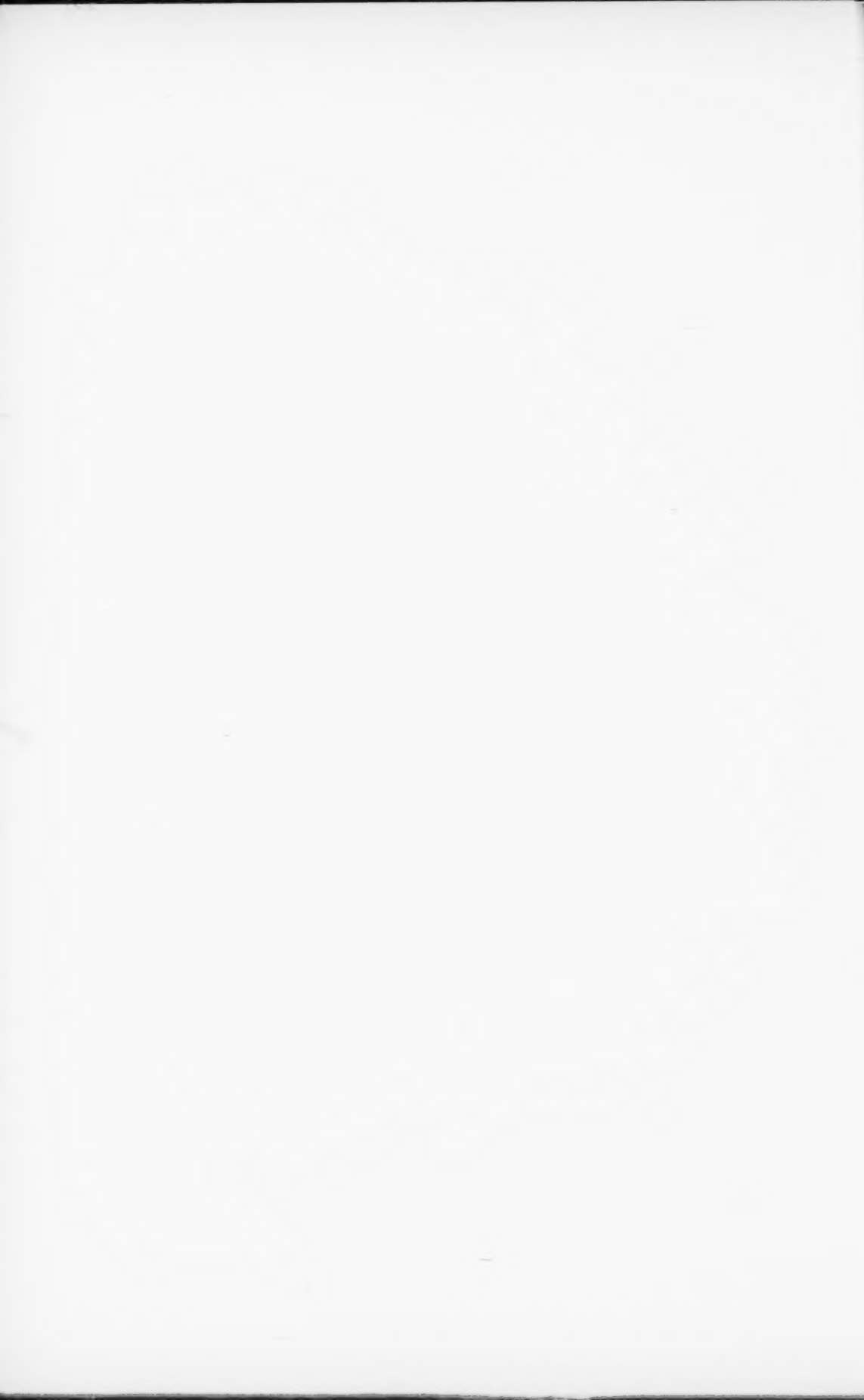
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~~No.~~ 87-1796

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Respondents

PETITIONERS' REPLY BRIEF

This brief replies to respondents' arguments that this Petition presents only a very narrow issue of law (Brief in Opposition, pp. 9-14) and demonstrates that substantial and unresolved questions of federal law compel review by this Court.

Ten states argue to this Court that the Fourth Circuit decision depriving

social workers of qualified immunity has a truly staggering impact on thousands of state officials who administer federal grant programs. 1/ Social workers, in particular, are now exposed to lawsuits and second-guessing for difficult decisions made decades ago and are expected to meet unrealistic and ill-defined standards of performance. 2/

Respondents strain to diminish the importance of this case but cannot disguise the overriding public concern for preserving the qualified immunity defense. To deflect the Court's attention from this issue, respondents rely on questionable interpretations of the Rules

1/ See Brief of States as Amici Curiae, ("States") p. 2.

2/ See Motion for Leave to File Brief as Amicus Curiae of National Association of Social Workers ("Social Workers"), pp. 2-3.

of this Court 3/, narrowly state petitioners' argument 4/, and fail to cite

3/ For example, respondents argue that this Petition is brought only by "social workers," see Brief, pp. 10-11, and state: "The Petition nowhere indicates which of the parties filed it." Brief, p. 11, n.l. The Petition contains this indication where it belongs — in the List of Parties. See Rule 21.1 (b). All of these parties were sued for damages and deprived of the defense of qualified immunity. And, notwithstanding respondents' exceedingly narrow use of the term, petitioners, along with ten states and the National Association of Social Workers, consider that the interests of these individuals, and thousands of unnamed persons, are at stake in this case.

4/ Contrary to respondents' suggestion that this case involves only "a repealed provision of law and the liability of only some of the defendants," Brief, p. 10, petitioners nowhere concede that this statute — 42 U.S.C. §608(f) — is the sole basis for appeal. Petitioners stressed that no statutory right to care and protection was clearly established until the courts below created it. Petition, pp. 6-7. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (court must determine whether law was clearly established at the time an action took place). The Question Presented focuses, as it should, on when the courts below held respondents' rights were first created; petitioners' argument that the 1980 statute — 42 U.S.C. §627 et seq — likewise creates no clearly established statutory rights comprises a "subsidiary question fairly included therein" under Rule 21.1(a).

relevant authority 5/ and misapply other authority. 6/ Respondents also err on matters of greater substance, the gravity of which justify careful review by this Court. These include the following:

A. This case raises the issue of whether the defense of qualified immunity should be transformed into a doctrine of unlimited liability. 7/ Respondents believe that mere allegations of intentional acts or of deliberate indifference are sufficient to abrogate

5/ Plaintiffs fail to cite even a single case in which this Court has upheld a right to claim damages under §1983 for violations of spending power statutes.

6/ Plaintiffs' citation to three cases upholding the right to seek damages under §1983 is unavailing, for none involved alleged statutory violations. See Brief, p. 30, citing Gomez v. Toledo, 446 U.S. 635 (1980); Owen v. City of Independence, Missouri, 445 U.S. 622 (1980); Monnell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

7/ See Social Workers, p. 3.

qualified immunity. See Brief, pp. 6, 37-38, 45. But at the heart of this Petition are discretionary acts made by case-workers, supervisors and administrators.

8/ Compelling defendants to stand trial for violations of a right as abstract as one to "care and protection" transforms a guarantee of immunity into a rule of pleading. Anderson v. Creighton, ____ U.S. ____, 107 S.Ct. 3034, 3039 (1987). The qualified immunity doctrine looks beyond the simple expedient of artful pleading and protects officials whose judgments turn out wrong. 9/

B. Without citing any authority,

8/ In essence, plaintiffs charge social workers with making wrong decisions, i.e., placing children in or failing to remove them from homes that were unsuitable. See District Court Opinion (App. 26a).

9/ Accord, Mitchell v. Forsyth, 472 U.S. 511, 535 (1985) ("The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted.").

respondents argue that this Court lacks jurisdiction to decide whether damages are available under 42 U.S.C. §1983 for violations of the foster care statutes. See Brief, pp. 12-13, 26-27, 41. 10/ This Court should resolve this important question because a reversal of the court of appeals would allow defendants to avoid further discovery and trial. 11/ Petitioners properly present this issue,

10/ The Fourth Circuit is the only circuit to hold that damages are available. Respondents argue that no conflict exists in the circuits on this point, Brief, pp. 39-40, but cannot deny that the Fourth Circuit stands alone and that other circuits have denied claims for §1983 damages under the foster care law.

11/ Mitchell, supra, 472 U.S. at 526 ("The entitlement is an immunity from suit rather than a mere defense to liability; and like absolute immunity it is effectively lost if a case is erroneously permitted to go to trial.").

12/ because no right to damages can be clearly established if it does not exist. For states administering federal grant programs, it is critical to know whether their employees now face potential suits.

13/ Whether Congress intended to create enforceable rights to damages under §1983

12/ Respondents contend for the first time that some of petitioners are city employees and therefore are not entitled to qualified immunity. Brief, pp. 43-44. See Owen, supra, 445 U.S. at 638 (municipal employees not entitled to qualified immunity defense). Regardless of whether respondents may raise this argument in this Court, it is undisputed that at least five of the petitioners — Massinga, Farrow, Duva, Nocar and Randall — are state employees.

13/ See States, p.2. This Court's decision in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) has, until the Fourth Circuit's decision, provided clear guidance: "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."

for violations of the Spending Clause statutes deserves resolution by this Court. 14/

C. Respondents argue that the qualified immunity defense has nothing to do with their right to recover damages against state officials. Brief, pp. 21-25. Yet this Court has stated that the principal rationale for affording the defense is to limit an official's liability for monetary damages. Mitchell, supra, 472 U.S. at 525. 15/ A defendant's

14/ See Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19 (1981). Respondents' reference to injunction cases, Brief, pp. 36-37, hardly demonstrates Congressional intent to create an enforceable right to damages under §1983.

15/ See also Davis v. Scherer, 468 U.S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages...."); Anderson, supra, 107 S.Ct. at 3042 ("Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law.").

knowledge of remedies against him is relevant to the application of the doctrine. 16/ This Court has never adopted respondents' position that the defense distinguishes between rights and remedies. Because the Fourth Circuit in this case has virtually eroded the qualified immunity defense, this Court should carefully examine the scope of protection available to thousands of state officials.

16/ Accord, Social Workers, p. 11 ("By raising social worker vulnerability beyond what is necessary or fair, the court of appeals creates a professional environment in which avoiding liability — rather than serving children — becomes the goal.").

CONCLUSION

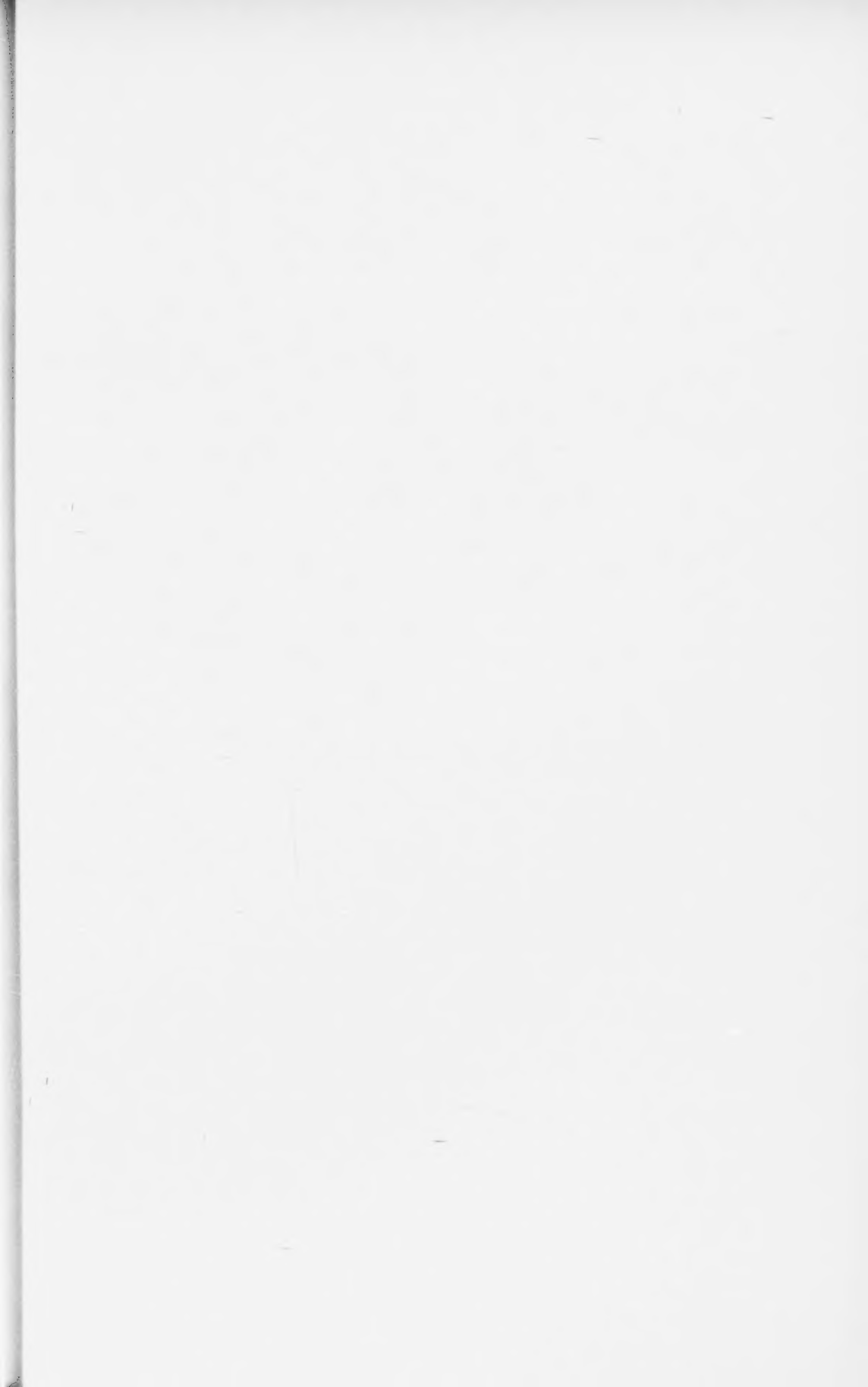
The Court should grant the petition and review the judgment of the Fourth Circuit for the reasons set forth herein.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSIGNA, et al.,

Petitioners,

v.

L.J., et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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PETITIONERS' SUPPLEMENTAL BRIEF

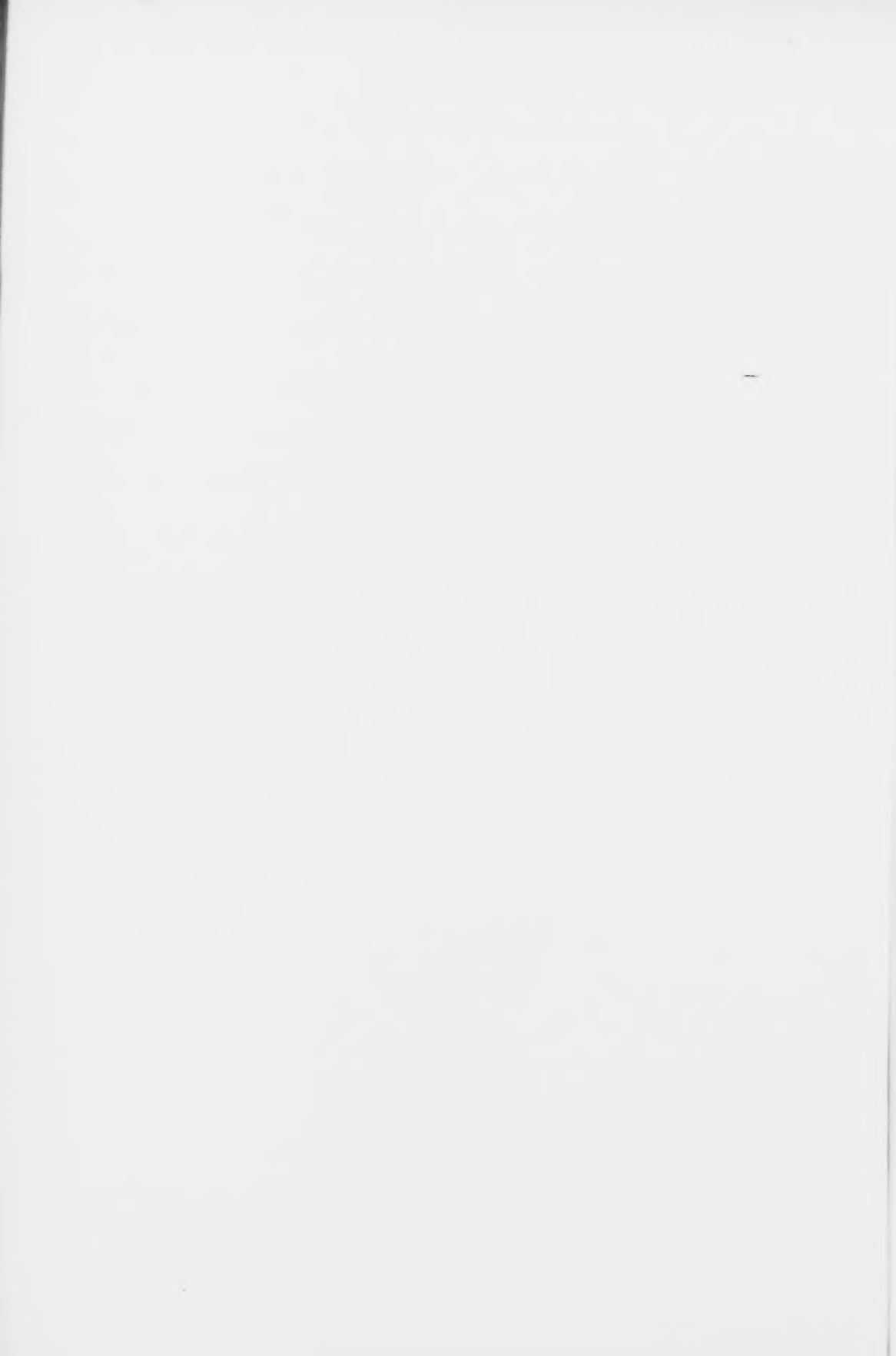
This supplemental brief is submitted to bring to the Court's attention the recent decision of the Fifth Circuit in Del A., et al. v. Edwards, et al., 855 F.2d 1148 (1988), which further demonstrates the importance of the question presented to this Court in the petition.



Del A. addressed the availability of the Harlow¹ qualified immunity defense to Louisiana state officials working in or responsible for the Louisiana foster care program. The majority decision, relying heavily on the case sub judice, L.J. v. Massinga, found that the Adoption Assistance and Child Welfare Act of 1980 ("the Act")², particularly "the requirements calling for case plans, case review systems, proper care . . . and the maintenance of standards reasonably in accord with those of national organizations 'spell out a standard of conduct, and as corollary rights in the plaintiffs' sufficient to defeat qualified

¹ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")

² 42 U.S.C. §§ 620-28, 670-79.



immunity." 855 F.2d at 1154 (quoting L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988)). Thus, the Fifth Circuit held that "[n]o reasonable official could have believed such inaction was lawful" and, therefore, the defendants were not entitled to qualified immunity.³ 855 F.2d at 1154.

Del A. thus confirms the importance of the question presented here: Whether the foster care provisions of the Social Security Act, as adopted in 1961⁴ and amended in 1980,⁵ clearly established rights in the plaintiff foster children enforceable by suits for damages so as to deprive the defendant social workers and their superiors

³ The majority finds that these state officials, by failing to follow precisely the dictates of the Act, knew or should have known that they were violating statutory rights of foster children.

⁴ 42 U.S.C. § 608(f) (repealed).

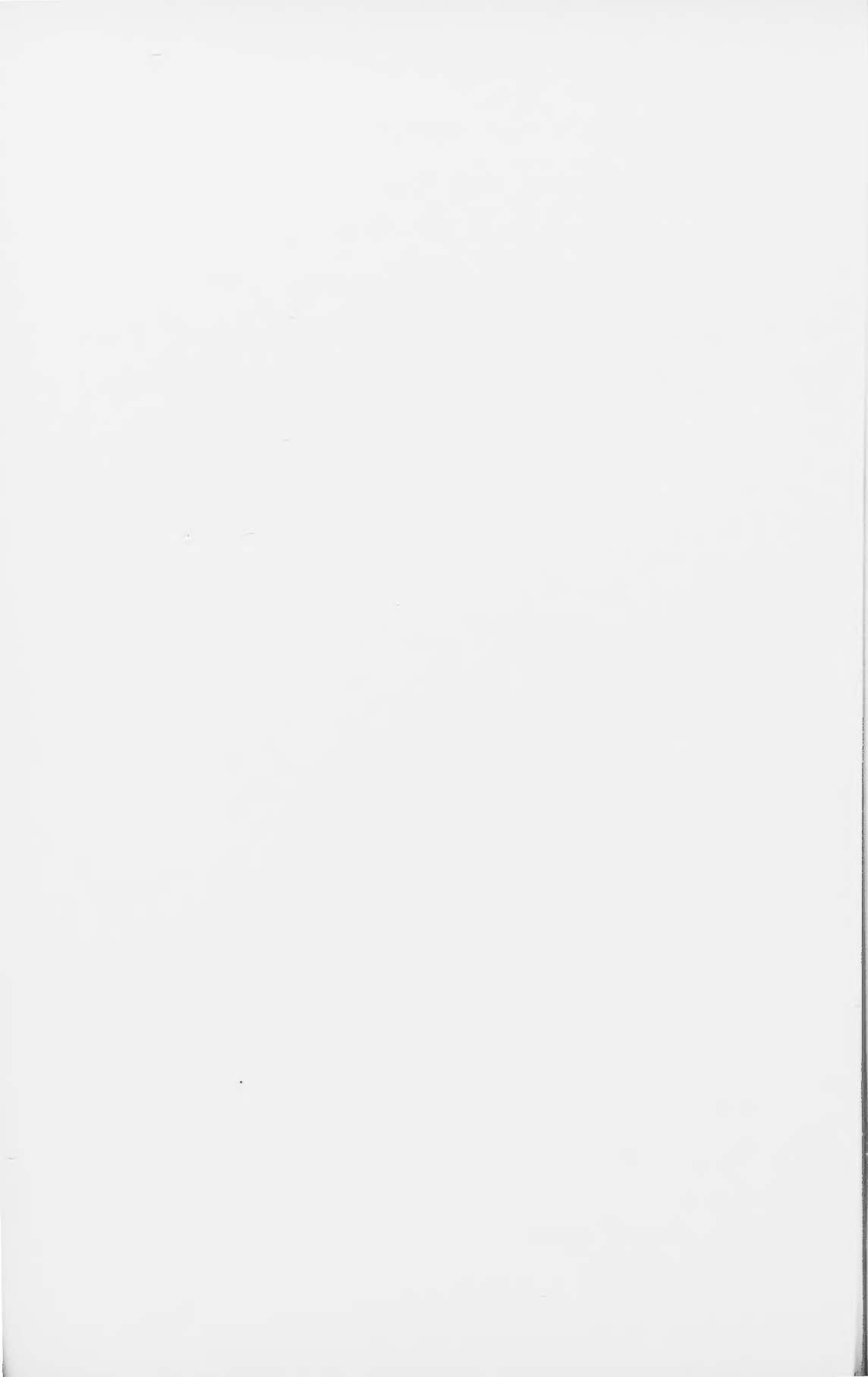
⁵ 42 U.S.C. §§ 620-28, 670-79.



of their qualified immunity.⁶ Prior to L.J. v. Massinga and now Del A. v. Edwards, no court had ever held that these federal funding statutes so clearly established rights in foster children that the qualified immunity of social workers and others implementing the federal grant program is defeated.⁷ These holdings are particularly

⁶ The Fourth Circuit decided both that qualified immunity is unavailable to these defendants (because the statutory rights of plaintiffs were clearly established) and that these foster children have a cause of action for damages against these defendants. L.J. v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988). The question presented here fairly includes the issue of whether plaintiffs have a cause of action for damages under this federal grant program. See Sup. Ct. R. 21.1(a). If they do not, these rights are not clearly established and do not defeat these defendants' qualified immunity. See Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); Drake v. Scott, 812 F.2d 395, 399 (8th Cir.), modified on other grounds, 823 F.2d 239 (8th Cir.), cert. denied, 108 S. Ct. 455 (1987); see also, Del A. v. Edwards, 855 F.2d 1148, 1155 (5th Cir. 1988) (Smith, J. dissenting).

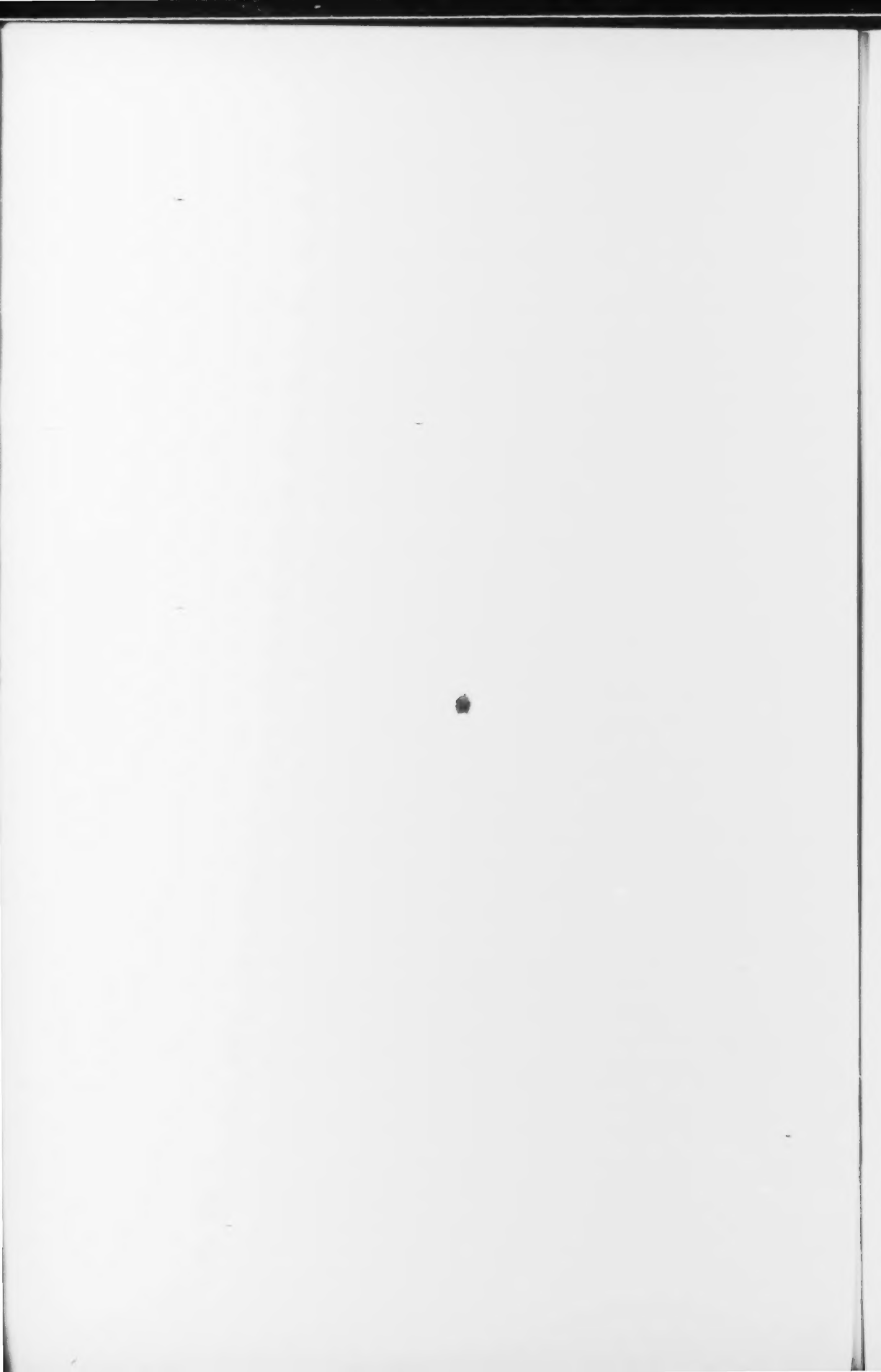
⁷ See Petitioner's Brief at 11-12.



astounding given the vagueness of the statutes and that the statutory mandate is directed to the States, not to social workers, to establish certain guidelines and criteria for operating the foster care program.⁸

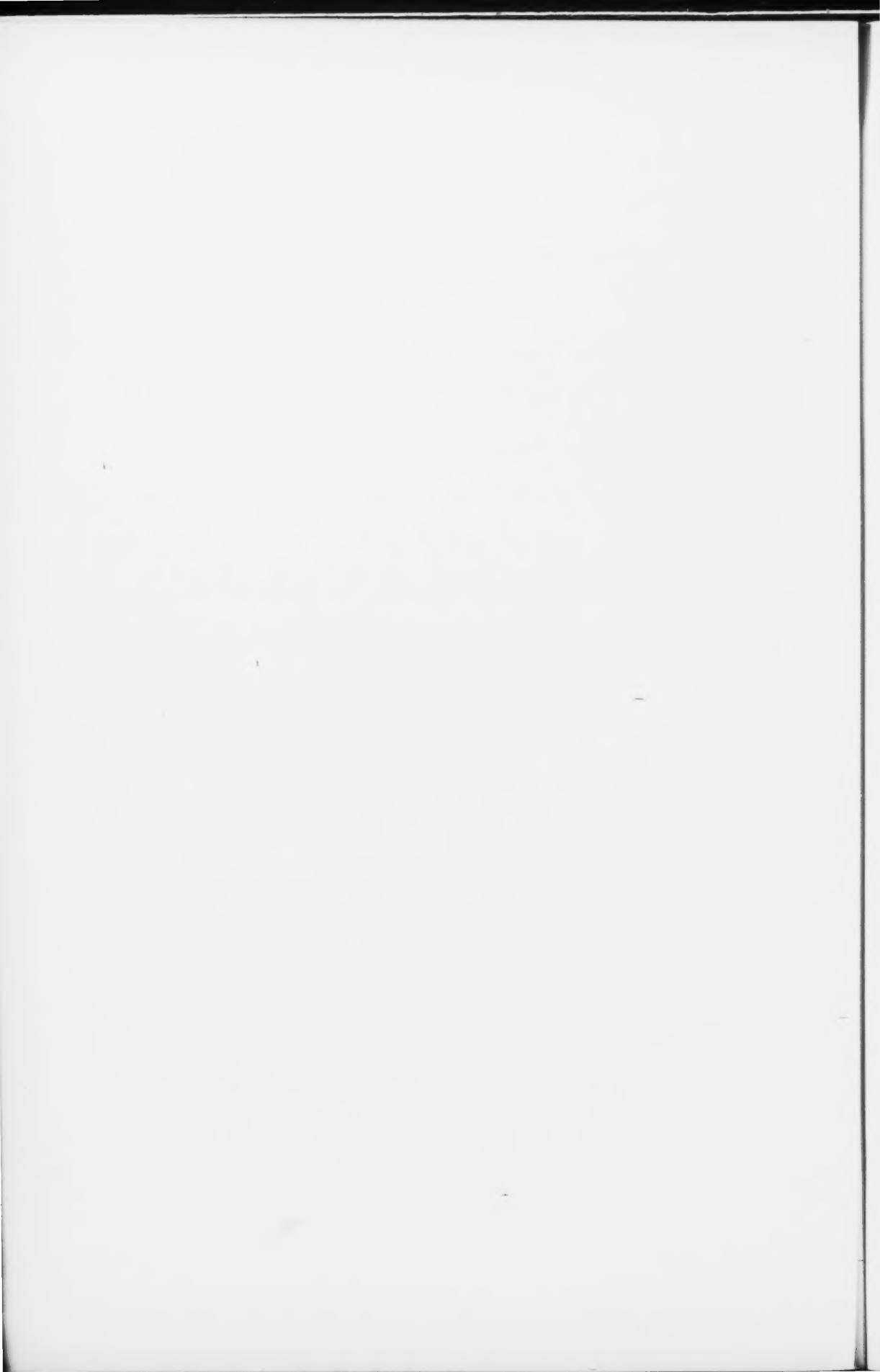
The significant impact of these opinions is demonstrated by the Del A. dissent, which points out that the majority would hold the Governor of Louisiana and other state officials personally liable for damages to foster children, if a federal grant provision

⁸ Even if one were to interpret 42 U.S.C. § 608(f) (repealed), for example, as establishing a right to a "plan . . . to assure that [a foster child] receives proper care", it simply does not follow that a social worker would know that by placing plaintiff P.G., for example, in an allegedly unsuitable home was "objectively legally unreasonable" or that the social worker would "understand that what he is doing violates that right." Anderson v. Creighton, ____ U.S. ____, 107 S. Ct. 3034, 3039 (1987).



deadline was missed, because "the defendants would have violated a clearly-established right cognizable under section 1983. . . ." 855 F.2d at 1154 (Smith, J., dissenting). The dissent correctly rejects this view: "state officials do not owe harmed individuals, from their own pockets, where the state violates a federal funding statute." 855 F.2d at 1157 (Smith, J., dissenting) (citing Rosado v. Wyman, 397 U.S. 397, 420 (1970); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596 (1983)).

The question presented demands resolution by this Court, for to hold social workers personally liable for actions taken over decades of public service on the basis that vague, general federal grant statutes clearly established rights in foster children is patently unfair, puts social workers and



state officials in an untenable situation, and is against the public interest.⁹ The Del A. dissent captures well the problem:

"[T]he majority has placed an intolerable burden upon public officials who, wishing to take advantage of federal assistance, are faced with a more-than-imaginary conflict of interest: they must decide between substantial financial assistance for a deserving and disadvantaged class of their own citizens, on the one hand, and reasonably insuring themselves against personal financial disaster, on the other. Congress could not have intended so unpalatable and counter-productive a scheme, and our system of federalism would appear to forbid it."

855 F.2d at 1160 (Smith, J., dissenting).

CONCLUSION

The Court should grant the petition and review the judgment of the Fourth Circuit for the reasons set forth in the petition and in

⁹ See Motion for Leave to File Brief as Amicus Curiae of National Association of Social Workers, pp. 5-9.

petitioners' subsequent briefs and those of
the amici.

Respectfully submitted,

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**ON PETITION FOR A WRIT OF CERTIORARI
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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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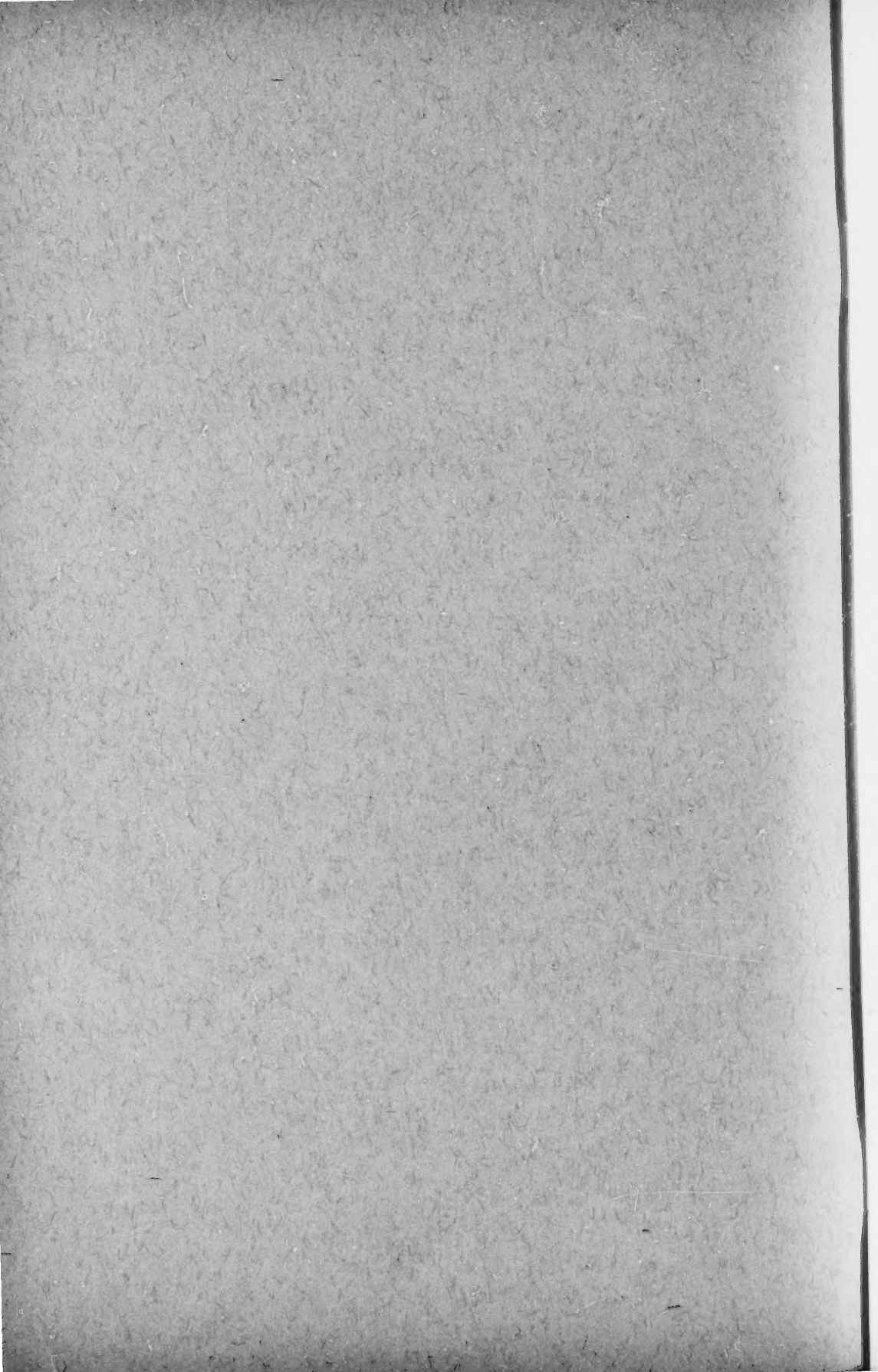
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QUESTIONS PRESENTED

1. Whether there is a private cause of action for damages under 42 U.S.C. 1983 for violations of the foster care provisions of the Social Security Act, 42 U.S.C. (& Supp. IV) 601 *et seq.*, 620 *et seq.*, and 670 *et seq.*

2. Assuming that there is such a cause of action, whether petitioners, who are Maryland state and local social welfare employees, are entitled to qualified immunity in a lawsuit asserting that cause of action.



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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case involves an attempt to hold social welfare workers financially liable for injuries suffered by foster children while in the care of their foster parents. Respondents, children placed in foster homes by Maryland social welfare agencies, claim to have suffered abuse and neglect because petitioners, state and local social welfare workers, failed adequately to supervise the care provided by respondents' foster parents. Respondents claim that petitioners' actions violate the foster care provisions of the Social Security Act.

1. Title IV-A of the Social Security Act, 42 U.S.C. (& Supp. IV) 601 *et seq.*, establishes the Aid to Families with

Dependent Children (AFDC) program. Under Title IV-A, the federal government reimburses eligible states for a specified portion of the costs incurred in providing assistance to needy families with dependent children. 42 U.S.C. (& Supp. IV) 601, 603(a). In order to be eligible for federal AFDC funding, a state must submit a "state plan" to the Secretary of Health and Human Services for approval. *Ibid.* Title IV-A specifies a variety of substantive and procedural provisions that must be contained in a state plan in order for it to be approved by the Secretary. 42 U.S.C. (& Supp. IV) 602(a). Once a state plan has been approved, if the Secretary finds "a failure [on the part of the state] to comply substantially with any provision required * * * to be included in the plan," the Secretary may limit or discontinue federal funding until the state restores itself to compliance. 42 U.S.C. 604(a).

In 1961, Congress amended Title IV-A to cover assistance to foster children. See generally *Miller v. Youakim*, 440 U.S. 125 (1979). From 1961 to 1980, the principal provisions of the AFDC program regarding foster care were set forth in Section 408 of the Social Security Act, 42 U.S.C. (1976 ed. & Supp. IV 1980) 608 (repealed 1980). Section 408 imposed several conditions on states seeking AFDC reimbursement for foster care services. Among its conditions, Section 408(f) required states to include in their state plans "provision[s] for * * * development of a plan for each [foster] child * * * to assure that he receives proper care * * *." 42 U.S.C. (1976 ed.) 608(f).

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (Adoption Assistance Act). The Adoption Assistance Act repealed Section 408 of the Social Security Act and replaced it with a new Title IV-E. §§ 101(a)(1)-(2), 94 Stat. 501-512 (codified at 42 U.S.C. (& Supp. IV) 670 *et seq.*). Like former Section 408, Title IV-E imposes conditions

that states must meet in order to be eligible for AFDC foster care funds. See 42 U.S.C. (& Supp. IV) 671(a). Those conditions include an expanded set of requirements relating to the health and safety of foster children.

First, state plans must provide for the development of a "case plan" and a "case review system" for each eligible foster child. 42 U.S.C. (& Supp. IV) 671(a)(16). The case plan must include "a plan for assuring that the child receives proper care and that services are provided * * * [to] address the needs of the child while in foster care * * *." 42 U.S.C. (& Supp. IV) 675(1). The case review system must provide a mechanism by which the status of eligible foster care children is reviewed at least every six months "in order to determine the continuing necessity for and appropriateness of the placement [and] the extent of compliance with the case plan * * *." 42 U.S.C. 675(5)(B).

Second, state plans must provide for the establishing and maintaining of standards for foster family homes "which are reasonably in accord with recommended standards of national [foster care] organizations * * *, including standards related to * * * safety, sanitation, and protection of civil rights * * *." 42 U.S.C. 671(a)(10). Such standards, once established, "shall be applied by the State to any foster family home" receiving AFDC foster care maintenance payments. *Ibid.*

Third, state plans must provide that when any state agency "has reason to believe" that a foster home "is unsuitable for the child because of the neglect, abuse, or exploitation of such child," the agency shall notify "the appropriate court or law enforcement agency." 42 U.S.C. 671(a)(9).¹

¹ A state's "substantial failure" to comply with the provisions of an approved state foster care plan, including the provisions relating to foster child health and safety, authorizes the Secretary to limit or discontinue AFDC funding under Title IV-E. 42 U.S.C. 671(b).

In addition to adding the foster care requirements of Title IV-E, the Adoption Assistance Act incorporates foster care requirements into Title IV-B, 42 U.S.C. (& Supp. IV) 620 *et seq.*, which provides additional federal funding for state child welfare services. As amended, Title IV-B disqualifies a state from receiving specified federal funding for child welfare services unless the state conducts a semi-annual "inventory" of foster children under its care to determine, *inter alia*, "the appropriateness of, and necessity for, the current foster placement * * *." 42 U.S.C. 627(a)(1). In addition, a state must "implement[] and [be] operating to the satisfaction of the Secretary" a specified group of foster care programs, including "a case review system * * * [under Title IV-E] for each child receiving foster care under the supervision of the State * * *." 42 U.S.C. 627(a)(2)(B).

2. Respondents in this case are five individual foster children and a class of children in foster care under the custody of the Baltimore City Department of Social Services. Respondents brought suit in 1984 against petitioners, various Maryland state and local social welfare employees. Respondents asserted that they suffered a variety of injuries, including physical and emotional abuse and inadequate medical care, while in foster homes to which they were assigned by petitioners. Respondents alleged that petitioners failed to investigate properly the treatment and care provided by foster homes and failed to respond adequately to information indicating that respondents were being mistreated. Pet. App. 4a, 9a-12a, 28a-30a; Pet. 3-4.

Respondents sought relief under 42 U.S.C. 1983, which provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. They claimed that the alleged acts and omissions by petitioners violated, *inter alia*, the foster care provisions of the Social Security Act

and the Due Process Clause of the Fourteenth Amendment. Respondents sought classwide declaratory and injunctive relief relating to the administration of petitioners' foster care programs, and, further, sought damages from petitioners for the physical and emotional injuries allegedly suffered while in the care of their foster families. See Br. in Opp. App.

Respondents moved for preliminary injunctive relief and petitioners filed a motion for partial summary judgment. Petitioners' summary judgment motion, which was confined to the claims for damages, was predicated on the defense of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny.² In July 1987, the district court granted respondents' motion and denied petitioners' motion. Pet. App. 25a-72a. In rejecting petitioners' qualified immunity defense, the district court held, inter alia, that the Social Security Act's foster care provisions imposed clearly established legal obligations on state foster care personnel and that challenges to a state's compliance with those obligations may be brought under 42 U.S.C. 1983. Pet. App. 65a-72a. Petitioners appealed the preliminary injunction and the denial of summary judgment to the Fourth Circuit.

3. The court of appeals affirmed (Pet. App. 1a-24a). The court first upheld the district court's preliminary injunction, finding that respondents had stated a valid due process claim and that they had satisfied the other re-

² In moving for partial summary judgment, petitioners initially asserted qualified immunity only as to the allegations of conduct that occurred prior to 1980. Thereafter, in argument before the district court, and in their appeal to the Fourth Circuit, petitioners asserted immunity as to conduct engaged in both before and after 1980 (Pet. App. 15a).

quirements for injunctive relief (*id.* at 6a-15a).³ Turning to petitioners' claim for damages, the court of appeals held that petitioners are not entitled to qualified immunity under *Harlow* because their alleged conduct violated clearly established statutory duties under the Social Security Act (*id.* at 15a-24a). In particular, the court explained that "[t]aken together," the statutory foster care provisions "spell out a standard of conduct [by petitioners], and as a corollary rights in [respondents], which [respondents] have alleged have been denied" (*id.* at 22a-23a). The court of appeals also held that in elaborating the right to sue under Section 1983 this Court has not "distinguish[ed] between prospective equitable relief and an action for money damages" (Pet. App. 22a-23a).

DISCUSSION

Two legal questions decided by the court of appeals are arguably raised by the present petition. The court addressed, first, the issue of qualified immunity, and held that the acts and omissions allegedly committed by petitioners violated "clearly established" legal standards under the foster care provisions of the Social Security Act. It therefore concluded that petitioners are not entitled to qualified immunity. Thereafter, the court of appeals held that Section 1983 provides a cause of action to recover damages for violations of the foster care provisions.

We believe that the first holding rests on a highly questionable application of this Court's immunity decisions. Nevertheless, in our view this aspect of the court's decision does not warrant further review at this time. The second holding, however, raises important and unresolved issues

³ Petitioners have not asked this Court to review the court of appeals' decision regarding the preliminary injunction.

concerning the availability of damages under Section 1983 for violations of federal Spending Clause statutes. Accordingly, we believe that that portion of the court of appeals' decision merits consideration by this Court.⁴

1. In the *Harlow* case, this Court held that an official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (457 U.S. at 818). More recently, in *Anderson v. Creighton*, No. 85-1520 (June 25, 1987), the Court held that plaintiffs cannot circumvent the *Harlow* standard "simply by alleging violation of extremely abstract rights" (slip op. 4). The Court explained that in order for a defense of qualified immunity to be overcome, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (*ibid.*). Thus, under *Anderson*, a court cannot resolve qualified immunity issues simply by asking whether a constitutional or statutory right is "clearly established" in the abstract. Instead, it must ask whether the official's actions fell within the clearly established contours of that right. That inquiry is necessarily "fact-specific" (*Anderson*, slip op. 6), in that the court must examine the particular actions the defendant is alleged to have performed and determine whether the governing legal standards clearly proscribed those acts.

In concluding that petitioners violated "clearly established" statutory rights, the court of appeals did not perform the analysis mandated by *Anderson*. Rather, the

⁴ Petitioners appear to collapse both issues into a single Question Presented. We believe that the issues are analytically distinct, and thus we address them separately.

court simply recited the statutory provisions at issue and, without further discussion, surmised that “[t]aken together * * * these statutory provisions spell out a standard of conduct * * * which plaintiffs have alleged have been denied” (Pet. App. 22a-23a). The court’s discussion is almost wholly divorced from the specific controversy before it. Although the complaint sets forth detailed allegations concerning the actions of petitioners, the court made no apparent effort to compare the asserted statutory rights with the specific conduct alleged in the complaint. The court thus failed to determine whether “[t]he contours of the right[s] [were] sufficiently clear” (*Anderson*, slip op. 4) that petitioners should have understood that their alleged actions violated those rights.⁵

For several reasons, however, we do not believe that the court’s resolution of the qualified immunity issue warrants review by this Court. While plainly challenging the denial of immunity in the Question Presented (see Pet. i), petitioners focus primarily on the court of appeals’ holding that Section 1983 provides private remedies in general, and

⁵ The Court’s failure to follow *Anderson* is especially pronounced because the complaint, rather than alleging similar conduct by each petitioner, alleges significantly different types of conduct by different petitioners. For example, respondents allege that particular Baltimore social workers failed to respond properly to specific instances of abuse and neglect. See, e.g., Complaint ¶¶ 65-129 (Br. in Opp. App. 50-80). At the same time, respondents allege that senior state administrators maintained inadequate oversight over the municipal social service programs involved in the litigation. See, e.g., Complaint ¶ 234 (Br. in Opp. App. 125-128). Under *Anderson*, petitioners’ qualified immunity claims cannot properly be resolved without asking whether each of these persons should have known that his or her particular actions violated federal law. In contrast, the court of appeals adopted a blunderbuss approach that disposed of 23 individuals’ qualified immunity claims in a single sentence (Pet. App. 17a-18a).

damages in particular, for violations of the foster care provisions of the Social Security Act. See pp. 10-15, *infra*. The petition does not contend in any detail that the court of appeals actually erred in concluding that petitioners violated clearly established statutory rights. We are reluctant to urge this Court to resolve an issue that petitioners themselves have not addressed clearly.

Second, although the court of appeals did not follow the standards set forth in *Anderson*, that failure, without more, does not justify further review by this Court at the present time. The analytic framework established by *Anderson* is clear, and petitioners do not suggest that the lower courts have generally experienced difficulties in applying it. Moreover, despite the court's failure to apply the standards set forth in *Anderson*, it is not clear to us that the court of appeals erred in its ultimate holding that petitioners (or at least some of them) are not entitled to qualified immunity. A careful reading of the complaint suggests strongly that at least some of respondents' allegations might withstand qualified-immunity scrutiny under *Anderson* and *Harlow*. For example, the complaint specifically alleges that petitioners failed to prepare case plans and failed to conduct case reviews for respondents. See, e.g., Complaint ¶¶ 77, 124-125, 179-180, 202-203 (Br. in Opp. App. 54, 78, 98-99, 108). At least since 1980, the foster care provisions of the Social Security Act have expressly obligated participating states to prepare case plans and conduct periodic case reviews. See 42 U.S.C. (& Supp. IV) 627(a)(2)(B), 671(a)(6), 675(1), 675(5)(B). The complaint also alleges that petitioners failed to report known instances of child abuse to responsible courts and law enforcement agencies. See, e.g., Complaint ¶¶ 98-117, 235(e) (Br. in Opp. App. 62-74, 130). Since 1980, the governing statutory provisions have expressly provided

that when any state agency "has reason to believe" that a foster home "is unsuitable for the child because of the neglect, abuse, or exploitation of such child," the agency shall notify "the appropriate court or law enforcement agency." 42 U.S.C. 671(a)(9).⁶

Finally, the court of appeals' qualified immunity holding does not appear to be in conflict with the decision of any other court of appeals. Thus far, only one other court of appeals—the Fifth Circuit—has squarely addressed a claim of qualified immunity involving the foster care provisions of the Social Security Act. See *Del A. v. Edwards*, 855 F.2d 1148 (5th Cir. 1988). And the Fifth Circuit in that case, like the court of appeals in this one, concluded that the state officials were not entitled to qualified immunity. *Del A.*, 855 F.2d at 1152-1154. Review by this Court properly can be deferred until there is a conflict among the circuits over the meaning of the foster care provisions or the "clearly established" nature of the rights they create.

2. The court of appeals also held (Pet. App. 22a-23a), albeit in a single, somewhat cryptic sentence, that Section 1983 provides a private right of action, including a right to recover damages, for violations of the foster care provi-

⁶ It is unclear whether a reversal by this Court of the court of appeals' denial of qualified immunity on the statutory claims would lead to termination of the damages actions as to any of the defendants. Respondents also pursued in their complaint a constitutional theory of liability, and the district court denied petitioners' summary judgment motion resting on qualified immunity from those claims (Pet. App. 64a). Having upheld the denial of immunity with regard to the statutory claims, the court of appeals found it unnecessary to decide the issue of immunity from the constitutional claims (*id.* at 18a). If this Court were to reverse the denial of immunity here in issue, the court of appeals would then be required to decide the issue of immunity on the constitutional claims.

sions of the Social Security Act. Petitioners contest that holding on two grounds. First, petitioners argue broadly (Pet. 15-18) that the Social Security Act's foster care provisions do not create rights that may be enforced under Section 1983. Second, petitioners contend more narrowly (Pet. 12-15, 18-20) that even if enforceable rights have been created, Section 1983 does not authorize federal courts to award damages (as opposed to injunctive relief) for their deprivation. Petitioners' second argument raises serious issues that merit review by this Court.

a. The issue on appeal to the court below was whether petitioners were entitled to qualified immunity. After finding the substantive obligations arising under the statute to be clearly established, the court proceeded to rule further that there is a cause of action for damages. It does not appear that the court was required to reach this issue in order to resolve the question of immunity. Whether or not it was required to do so, however, there is little doubt that the court of appeals had the power to reach and decide the damages issue under Section 1983.

The court's jurisdiction was predicated on *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which authorizes interlocutory appeals from denials of qualified immunity claims. Appellate jurisdiction under *Mitchell v. Forsyth* is not strictly confined to the issue of qualified immunity, but rather extends to ancillary issues that are potentially dispositive of the underlying litigation. See, e.g., *Drake v. Scott*, 812 F.2d 395, 397-399, modified on other grounds, 823 F.2d 239 (8th Cir. 1987), cert. denied, No. 87-587 (Nov. 30, 1987); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985). Here, the availability of qualified immunity and the right to recover damages under Section 1983 involve related questions about the obligations imposed by the Social Security Act's foster care provisions, and a decision that

damages are unavailable under Section 1983 would terminate the claims against petitioners in their individual capacities. Under these circumstances, the Fourth Circuit was free to reach and decide the availability of damages under Section 1983.

b. In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that Section 1983 normally "encompasses violations [by state officials] of federal statutory as well as constitutional law." Respondents' suit seeks relief for alleged violations of a federal statute and hence comes within the general scope of Section 1983 under *Thiboutot*.⁷ By its own terms, however, Section 1983 provides a cause of action only for deprivations of rights "secured by" federal law. Accordingly, no relief is available when a federal statute does not create enforceable rights for purposes of Section 1983. See, e.g., *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). For example, in the *Pennhurst* case, the Court held that the "bill of rights" provision of the federal Developmentally Disabled Assistance Act does not create enforceable rights in favor of mentally retarded persons and hence may not be enforced under Section 1983. Relying on *Pennhurst*, petitioners argue that the foster care provisions of the Social Security Act likewise do not create enforceable rights under Section 1983.

We believe that this broad challenge to the court of appeals' decision does not merit the Court's attention. In

⁷ Respondents also are seeking relief from alleged violations by petitioners of their rights under the Fourteenth Amendment. See n. 6, *supra*.

Rosado v. Wyman, 397 U.S. 397, 420 (1970) (emphasis omitted), a case that involved other provisions of the AFDC statute, the Court concluded "that petitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of federal monies * * * should the state not develop a conforming plan within a reasonable period of time." And in *Pennhurst*, the court indicated in two ways that some form of injunctive relief is available as a remedy for violation of the conditions of the AFDC statute. First, it cited the AFDC statute as evidence that "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." 451 U.S. at 17-18. Second, it referred without question or apparent reservation to the holding of *Rosado*, allowing an injunctive action by welfare claimants under the AFDC statute. *Id.* at 29.

In a number of other cases, this Court has entertained Section 1983 actions challenging state compliance with AFDC funding conditions, including at least one suit involving the same foster care program at issue here. See, e.g., *Miller v. Youakim*, *supra* (foster care under former Section 408); *King v. Smith*, 392 U.S. 309 (1968). To our knowledge, no court has ever suggested that the foster care provisions of the Social Security Act do not create enforceable rights for purposes of Section 1983.

c. Petitioners also assert (Pet. 12-15, 18-20), more narrowly, that the court of appeals erred in holding that Section 1983 authorizes courts to award damages for violations of the foster care provisions. We agree that that contention merits review.

i. The court of appeals' determination that damages are available under Section 1983 for violations of the foster care provisions is in conflict with decisions of two other courts of appeals. In *Scrivner v. Andrews*, 816 F.2d

261 (1987), the Sixth Circuit rejected a Section 1983 claim for damages based on the foster care provisions added to the Social Security Act in 1980 by the Adoption Assistance Act (see pp. 2-4, *supra*). The plaintiffs, a mother and daughter separated by Kentucky social welfare personnel, claimed that the state had deprived them of a right to "meaningful visitation" protected by the Adoption Assistance Act. The Sixth Circuit held that the Adoption Assistance Act did not create such a right, but that even if it did, "damages are not available in a § 1983 action alleging a violation of the Adoption Assistance Act" (816 F.2d at 264).⁸

The Eighth Circuit reached a similar conclusion in *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (1987). There, a grandmother brought suit for damages under Section 1983 based on the death of her grandchild, a recipient of AFDC support who died because of his mother's failure to attend to his medical needs. The grandmother contended, *inter alia*, that the state had failed to comply with a statutory duty of protection created by the AFDC program. The Eighth Circuit affirmed the dismissal of the grandmother's statutory claim, reasoning that the AFDC program was "enacted to enable states to provide financial assistance to needy persons and not as a means of seeking compensation when one of those persons is indirectly injured by the state." 820 F.2d at 928. Although the Eighth Circuit's opinion is not without ambiguity, the court of appeals appears to have held that

⁸ Although the specific foster care claim before the Sixth Circuit in *Scrivner* differed from the claim in this case, the Sixth Circuit concluded broadly that violations of the Act's foster care provisions (as amended by the Adoption Assistance Act) do not support a Section 1983 damages action.

violations of the AFDC provisions do not support a claim for damages under Section 1983. See *ibid.*⁹

ii. The division among the circuits regarding the availability of damages under Section 1983 for violations of the Social Security Act's foster care provisions reflects confusion over the more fundamental question whether Section 1983 authorizes courts to award damages for violations of federal Spending Clause legislation. This Court has addressed that question twice but has not definitively resolved it.

In *Pennhurst*, this Court stated, without deciding, that even when a Spending Clause statute imposes unambiguous (and hence binding) conditions on a grant of federal funds, it remains to be determined both whether there is "a private cause of action to compel state compliance with those conditions" (451 U.S. at 27-28 (footnote omitted)), and precisely what remedy may be available (*id.* at 29-30). The Court suggested that a court might be confined to prospective injunctive relief—more particularly, to "enjoining the Federal Government from providing funds" or directing the state to choose between rejecting the funds and complying with the condition. *Id.* at 29, 30 n.23. Noting that "[i]n no case * * * have we required a State to provide money to plaintiffs" based on violations of Spending Clause legislation, the Court questioned whether federal courts "could require the State to pay the additional sums demanded by compliance with federal standards." *Id.* at 29. However, the Court ultimately

⁹ *Harpole* involved abuse of a child by a natural parent rather than a foster parent, and hence the statutory claim rested on the general provisions of the AFDC program rather than the particular provisions regarding foster care. The Eighth Circuit's reasoning nonetheless appears to apply with equal force to the Social Security Act's foster care provisions.

declined to decide this question, which it characterized as a "difficult" one, because the court of appeals had not reached it. *Id.* at 30.

The court returned to the question in *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). Justice White, in a plurality opinion joined by then-Justice Rehnquist, asserted that "'make whole' remedies are not ordinarily appropriate" for violations of conditions in Spending Clause statutes and that, while "damages indeed are usually available in a § 1983 action, * * * such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute." 463 U.S. at 596-597, 602 n.23 (citing *Pennhurst*). Four Justices rejected that view, concluding that violations of Spending Clause legislation should be treated no differently from violations of non-Spending Clause legislation for purposes of damages. See *id.* at 624-634 (Marshall, J., dissenting); *id.* at 636-639 (Stevens, Brennan & Blackmun, JJ., dissenting). The three remaining members of the Court declined to resolve the issue, deciding the case on other grounds.¹⁰ As a result, no

¹⁰ Justice O'Connor, who concurred in the judgment, stated that "[f]or reasons given in Part I of the dissent by Justice Stevens, * * * I cannot agree with the limitations that Justice White's opinion would place on the scope of equitable relief available to private litigants suing under Title VI." 463 U.S. at 612. That statement might be read to support the four dissenters, rejecting the availability of damages in (UN) Spending Clause actions under Section 1983. On the other hand, Justice O'Connor also stated that she had "no occasion to address the question whether there is a private cause of action under Title VI for damages relief." 463 U.S. at 612 n.1. In addition, Justice O'Connor referred only to the availability of relief under Title VI, not to relief under Section 1983. *Ibid.* Based on the latter references, we do not believe that the *Guardians Association* case resolves the question whether damages are available under Section 1983 for violations of Spending Clause legislation.

opinion in *Guardians Association* commanded a majority of the Court concerning the availability of damages under Section 1983 for violations of Spending Clause statutes.

iii. Whether Section 1983 creates a damages remedy for violations of the Social Security Act's foster care provisions is a question of considerable practical importance. The Social Security Act's foster care provisions cover thousands of children in all fifty states. Government responsibility for the welfare of these children is spread through countless state and local social welfare departments. If the Fourth Circuit's view of the law is correct, thousands of state and local social welfare workers will now be exposed to the risk of personal financial liability under Section 1983 for injuries suffered by foster children in their foster homes. The practical consequences of such liability are potentially dramatic, not only for individual social welfare employees but for the programs that they administer.

The broader question underlying the Fourth Circuit's decision—whether Section 1983 supports a claim for damages for violations of federal Spending Clause legislation—has even more far-reaching practical implications. Dozens of federal statutes, including most of the Nation's major social welfare legislation, provide federal funding to states and localities under the Spending Clause in return for compliance with federally mandated conditions. Among the programs created by such statutes are the AFDC, Medicaid, and food stamp programs, which collectively affect tens of millions of Americans. See, e.g., 7 U.S.C. (& Supp. IV) 2011 *et seq.* (food stamps); 42 U.S.C. (& Supp. IV) 601 *et seq.* (AFDC); 42 U.S.C. (& Supp. IV) 1396 *et seq.* (Medicaid). See also *Maine v. Thiboutot*, 448 U.S. at 36-37 (Powell, J., dissenting) (listing additional Spending Clause statutes subject to claims under Section 1983). If state officials may be held personally liable for a

state's failure to comply with conditions imposed by such statutes, the potential scope for litigation and liability is enormous.

As noted above, this Court has squarely posed, but thus far failed definitively to answer, the question whether damages are available under Section 1983 in Spending Clause cases. The absence of a dispositive answer may have spawned a measure of conflict in the lower courts over the availability of damages for violations of the Social Security Act's foster care provisions. In *Scrivner*, the Sixth Circuit relied on Justice White's opinion in *Guardians Association* to support the conclusion that damages are not available for such violations. See 816 F.2d at 264. By contrast, the court below relied on this Court's recent decision in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), to support the opposite conclusion. See Pet. App. 22a-23a.¹¹

For all of these reasons, the specific question whether damages are available for violations of the Social Security Act's foster care provisions, and the more general question whether Section 1983 authorizes damages for violations of

¹¹ The court of appeals misread the *Wright* case. In *Wright*, the Court held that public housing tenants may bring suit under Section 1983 to redress violations of federal rent ceilings imposed by the Brooke Amendment to the Housing Act of 1937, a Spending Clause statute. The plaintiffs in *Wright*, however, did not seek damages under Section 1983 for the rent violations, nor did this Court address the availability of damages. Instead, the plaintiffs sought only to recover past rental overpayments. See *Wright*, 479 U.S. at 422 n.5; cf. *Bowen v. Massachusetts*, No. 87-712 (June 29, 1988), slip op. 13 (noting "long recognized" distinction between action at law for damages and equitable action "for 'the recovery of specific property or monies' ") (emphasis in original). Nothing in *Wright* suggests that the Court intended to endorse the general availability of damages under Section 1983 in Spending Clause cases.

federal Spending Clause statutes, warrant this Court's attention. In our view, this case is an appropriate vehicle for addressing those questions. Accordingly, we believe that that portion of petitioners' Question Presented which we have reformulated as our Question Number 1 merits further review by this Court.

CONCLUSION

For the foregoing reasons, and to the extent noted above, the petition for certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

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v.

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Respondents.

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**BRIEF IN OPPOSITION TO THE AMICUS BRIEF OF
THE UNITED STATES**

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On June 27, 1988 this Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General's Brief, filed in November, 1988, recommends that the Court not grant certiorari on the issues raised directly by the Petition for Writ of Certiorari. He does recommend, however, that the Court grant certiorari on one other issue -- an issue that was never briefed in the district court or court of appeals and arguably is not before this Court.

The Solicitor General in essence agrees with us that the only issues we contend are properly before this Court do not warrant review:

a) The inquiry as to whether petitioners have qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987), does not warrant plenary review by this Court. It is a "fact-specific" determination, Anderson, ___ U.S. ___, 107

S.Ct. at 3040; the Anderson framework is not one that is causing problems for Courts of Appeals; there is no conflict among the Circuits; the petition does not detail contentions as to how the Court of Appeals erred in making the Anderson determination; and the complaint's allegations withstand qualified immunity scrutiny under Anderson and Harlow (Brief at 9-10).

b) The petitioners' claim that the Social Security Act's foster care provisions do not create rights that may be enforced under Section 1983 also does not warrant plenary review by this Court. A series of cases, including Maine v. Thiboutot, 448 U.S. 1 (1980), Miller v. Youakim, 440 U.S. 125 (1979), and Rosado v. Wyman, 397 U.S. 397 (1970), establishes that Section 1983 encompasses claims of violations by state officials of federal statutes, including the foster care provisions of Title IV of the Social Security Act (the Aid to Families with

Dependent Children title). Brief at 12-13. As the Solicitor General says, apparently "no court has ever suggested that the foster care provisions of the Social Security Act do not create enforceable rights for purposes of Section 1983" (Brief at 13).

Nevertheless, the Solicitor General goes on to suggest that this Court should grant certiorari to decide a third issue: whether the Section 1983 cause of action -- which he agrees is available to enforce rights such as those created by the federal foster care statutes -- should provide a damage remedy in cases involving Spending Clause statutes. Granting such review would violate the usual rule that this Court will not consider issues not raised below; would embroil the Court in an issue as to which there is no conflict in the circuits; and would decide the issue prematurely, depriving the parties and the Court of the benefit of full development of the issue.

1. The issue the Solicitor General wants this Court to review was never raised below. The Solicitor General impliedly criticizes Chief Judge Winter's opinion for the Court of Appeals for saying "in a single, somewhat cryptic sentence" that Section 1983 provides a private right of action for damages (Brief at 10). But the Solicitor General fails to mention the explanation for the Court of Appeals' terseness: the issue he wants reviewed was never raised, briefed or mentioned by the city and state officials in the district court or the Court of Appeals.

In the District Court the petitioners sought partial summary judgment, claiming qualified immunity. They never filed a motion pursuant to F.R.C.P. 12 asserting that damages are not available under Section 1983 for violations of the federal foster care statutes and therefore that respondents failed to state a claim upon which relief could be granted.

In the Court of Appeals, the Brief of the Appellants (Petitioners here) primarily challenged the entry of a preliminary injunction. In the last few pages of their Brief, they turned to their claim that they had good faith immunity against damages under Harlow v. Fitzgerald, 457 U.S. 800 (1982). They asserted that the constitutional rights of the plaintiff children were not clearly established (Brief of Appellants in Court of Appeals at 48-54), and the statutory rights at issue also were not so clearly established as to be enforceable and to "avert the application of Harlow" immunity (Brief of Appellants in Court of Appeals at 54-57). That was the full extent of their appeal. Based on Mitchell v. Forsyth, 472 U.S. 511 (1985), the immunity issue was properly before the Fourth Circuit on interlocutory appeal. But the petitioners never raised in the District Court or in the Court of Appeals the

issue that the Solicitor General is now pressing instead: whether damage relief is per-se unavailable in any case of claimed violation of federal Spending Clause legislation brought under Section 1983. Petitioners never even cited the cases the Solicitor discusses here (Brief at 14-17), such as Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983), with the exception of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), on which Petitioners relied only to argue a very different principle, claiming that the foster care statute is unclear and therefore no enforceable rights at all had been asserted under the rulings in Pennhurst and Middlesex City Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The issue raised and language quoted by the Solicitor General from Guardians and Pennhurst were nowhere raised in the Court of Appeals.

From this vantage, the Court of Appeals' "somewhat cryptic sentence" is more understandable. It may be cryptic in the new context the Solicitor constructs around it, but it is more straightforward in the context of the actual issue the Fourth Circuit was asked to and did decide on interlocutory appeal: whether the foster care statute was sufficiently clear to avoid Harlow immunity in an action under Section 1983 for damages. As to this issue, the Fourth Circuit analyzed the foster care statutory claims made by plaintiffs and found that the statutes "spell out a standard of conduct, and as a corollary rights in plaintiffs...[that] are privately enforceable under 42 U.S.C. Section 1983," Appendix to Petition at 22A. The Solicitor General agrees with this proposition.

The Fourth Circuit then added the sentence on which the Solicitor General

focuses but never quotes in its entirety: "Moreover the Supreme Court did not distinguish between prospective equitable relief and an action for money damages in regard to the right to enforce privately in Wright v. Roanoke Redevelopment and Hous. Auth., _____ U.S. _____, 107 S.Ct. 766, 770 n.5, 773 (1987)." (Pet. App. 22a-23a). The Solicitor General has tried to transform this single statement describing factually and correctly a ruling of this Court into something it was not. In the context of the issues before the Court of Appeals, the sentence may have been meant as a gloss on the finding that the rights were sufficiently clear to be enforced through Section 1983, overcoming defendants' objections -- whether based on Pennhurst as to any relief or Harlow as to damages -- that they were not clear enough.

If the sentence is read instead, as suggested by the Solicitor General now, as a statement on the Section 1983/Spending Clause issue, then it was arguably dictum, since the Spending Clause question was not raised and certainly did not need to be decided to resolve the issues that were before the Court of Appeals on the interlocutory appeal.

Even assuming that the Solicitor is correct in asserting (Brief at 11) that the Court of Appeals had the power to reach and decide the Spending Clause issue, itself not appealable on an interlocutory basis, as ancillary to the immunity issue appealable under Mitchell v. Forsyth, 472 U.S. 511 (1985), the Spending Clause issue in fact was not presented to the Court.

The Solicitor General relies on cases such as Drake v. Scott, 812 F.2d 395 (8th Cir. 1987) in arguing that there was jurisdiction of the ancillary Spending Clause issue because

it was potentially dispositive of the litigation (Brief at 11). But each of the cases he cites involved ancillary issues that were properly presented through motions to dismiss or for summary judgment at the district court level along with the qualified immunity issue, and then were briefed and argued at the appellate level. See Drake, 812 F.2d at 397. Such was not the case here, where no motion or brief was ever filed on the Spending Clause issue. And while the Solicitor General explains why the Fourth Circuit was free in the abstract to decide an ancillary issue (Brief at 11-12), he nowhere explains why he reads the Fourth Circuit opinion as having decided it, nor does he explain why this Court should wholly ignore two prudential concerns.

The first is the Court's long-standing concern to keep interlocutory review narrow. The Solicitor General's invitation to ignore

in this case the qualified immunity question that is appealable and consider only the "ancillary" issue of damages under Section 1983 that is not appealable standing alone turns this concern and Mitchell v. Forsyth on their heads. It would allow government defendants to appeal a very wide spectrum of adverse rulings on an interlocutory basis if they can wag the cause of action dog by using the qualified immunity tail.

The second rule the Solicitor General asks the Court to ignore is that, ordinarily, this Court will not decide issues that are not raised in the Court of Appeals. Delta Air Lines v. August, 450 U.S. 346, 362 (1981); Youakim v. Miller, 425 U.S. 231, 234 (1976); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

Moreover, it is not even clear that the certiorari petition has presented the issue to this Court, despite the Solicitor's effort to

extract and reframe it. The Question Presented itself shows that petitioners still see the central issue as Harlow immunity. The Solicitor himself writes that "two legal questions decided by the court of appeals are arguably raised by the present petition." Brief at 6 (emphasis added). We submit that this Court should not reach out to decide on interlocutory appeal a question which is not itself subject to interlocutory appeal, which was not raised in the courts below and which "arguably" is not raised in the petition for certiorari.

2. This Court also should not review the issue which the Solicitor presents because there is no conflict between courts of appeals. No other circuit court has considered whether a damage remedy is available under Section 1983 in a case involving violations of foster care statutory rights that the court found to state a cause

of action and be enforceable for purposes of injunctive relief. The cases cited by the Solicitor General for a conflict instead are ones in which circuit courts have held that the particular statutory rights alleged to have been violated were not enforceable at all through Section 1983, for any purpose (prospective injunctive or monetary relief), because the alleged rights were not clear or definite enough in the Social Security Act.

The Solicitor General first cites Scrivner v. Andrews, 816 F.2d 261 (6th Cir. 1987), which held that there was no enforceable right under the foster care statute to "meaningful visitation" by a parent to a child in out-of-home care. The court distinguished the asserted right from the very different claims in Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983), which held, as did the courts below in this case, that the foster

care statute's rights to individualized case plans and case reviews are enforceable through Section 1983. Scrivner differs from this case and Lynch because the claim of a right to meaningful visitation is simply a very different substantive claim, not specifically set out in the statute and insufficiently clear to be enforceable under Section 1983.

The Scrivner court also noted in dictum that the circuit had earlier determined that damages were not available in a Section 1983 foster care action, citing Leshner v. Lavrich, 784 F.2d 193 (6th Cir. 1986). The court in Leshner, however, actually had been a much more limited ruling and never reached the issue for which it is cited in Scrivner.

In Leshner, two parents sued for the return to their custody of their two children who had been found neglected and dependent. They claimed there had not been a program of

preventive services to avert the out-of-home placement, as arguably required by the foster care statute. On this basis they asked the federal court to rule that the state court judgment which had deprived them of custody was a nullity and to award consequential damages. The Sixth Circuit denied all forms of relief, holding that the relief sought "nullifying a prior state court judgment of child neglect or dependency, or awarding damages in connection therewith" was not available merely because the state had failed to comply with the federal statute on preremoval services. 784 F.2d at 198. Lesher did not consider, much less determine, whether damages were foreclosed under Section 1983 when violations of foster care law presented claims otherwise cognizable by the federal court. Nor was any Spending Clause argument ever raised.

The Solicitor also cites Harpole v. Arkansas Department of Human Services, 820 F.2d 923 (8th Cir. 1987), to show a conflict. In Harpole, a grandmother claimed her grandson's constitutional rights had been violated when he died from parental neglect after the county social services agency had released him to the custody of his mother.

The Eighth Circuit rejected the Constitutional claims. In the last paragraph of the opinion the court also briefly addressed claims under the Social Security Act -- looking at provisions not involving foster care and which the Solicitor General concedes are different from those in this case (Brief at 15 n.9). The Eighth Circuit simply found that there were no enforceable rights that could provide the basis for a Section 1983 claim at all, and that the plaintiff did not argue that the Social Security Act itself

created a private cause of action. This last point is what the portion of the opinion the Solicitor quotes (Brief at 14) states -- the Social Security Act itself does not create a cause of action for "compensation." As the Solicitor says, the opinion "is not without ambiguity." (Brief at 14). But it is pretty clear that Harpole did not consider, much less decide, whether Spending Clause statutes can form the basis for a damage action under Section 1983 when otherwise enforceable rights have been violated.

In short, there is no case involving foster care statutes, nor, to our knowledge any Spending Clause statute, in which a court of appeals has held that there are enforceable rights under Section 1983 (applying the tests of cases like Middlesex County Sewage Authority, supra), but that relief is limited to an injunction and that Section 1983 can not

form the basis for an action for damages. The Solicitor's asserted conflict consists of ambiguous dicta from two circuits which have not considered that issue.

3. All other considerations aside, it is simply premature for the Court to give plenary review to the issue the Solicitor General presents. At some point in the future that issue may become one of importance, with splits in the circuits and widespread practical application. But the evidence to date suggests that the issue is not troubling the lower courts in any substantial way and that the practical implications are far less than the Solicitor General asserts.

While the Solicitor General suggests that there is "confusion" over the damages question, the circuits are really looking at different substantive portions of the foster care statute (or other Spending Clause

statutes) and finding some substantive claims enforceable and some not, applying the criteria of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex County Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). Neither the Solicitor General nor the petitioners has pointed to any case in which a court found injunctive relief available under Section 1983 but found damages unavailable because the underlying violation was of a Spending Clause statute. Perhaps more important, no lower court has given any thorough consideration as to the reasons that might support or caution against ignoring the language of Section 1983 and the presumption that Congress meant to allow reliance on it for a remedy. See Wright v. Roanoke Redevelopment and Hous. Auth., ____ U.S. ____, 107 S.Ct. 766, 771 (1987). There has been no

consideration by any lower court of how the legislative history of Section 1983, the development of Section 1983's case history, or any considerations of policy might affect the question of bifurcating the relief available. This Court would be considering the issue in a virtual vacuum of prior analysis by lower courts.

This vacuum exists even though it has been eighteen years since the Rosado v. Wyman decision, eight since the Maine v. Thiboutot decision and seven years since Pennhurst State School & Hospital v. Halderman. If it were really true that "the issue is one of considerable practical importance" (Brief at 15, 18), one would expect much more case law -- in numbers and depth of analysis -- from the lower courts.

Moreover, Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107

S.Ct. 766 (1987) is the most recent decision by this Court touching on this issue and it establishes that the Section 1983 remedy for violations of statutes enacted pursuant to the Spending Clause includes at least certain forms of monetary relief. While the Solicitor General tries to distinguish damages from a recovery of monies (Brief at 18 n.11), such a distinction may not have validity in this context. See Edelman v. Jordan, 414 U.S. 651 (1974). In any event, the impact of Wright on the matter raised by the Solicitor is one that would benefit from a fuller airing in the lower courts and allowing time for development of the issue.

In short, this is a classic situation in which this Court should not grant plenary review, but rather should await further developments in the lower courts. If more cases percolate up, it will become clearer

whether there is a real conflict in the circuits and what the practical implications are. This Court will then have the benefit of broader and deeper analysis of the issues by the lower courts. But in the instant case this Court is being asked by a non-party to grant plenary review in an interlocutory appeal of an issue not itself appealable on an interlocutory basis, not actually appealed to the Court of Appeals, not clearly encompassed in the Question Presented, and to which the Court of Appeals arguably devoted one sentence of dictum.

For these reasons, respondents respectfully urge this Court to deny the petition for certiorari.

Respectfully submitted,

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